In the Supreme Court of the United States.

OCTOBER TERM, 1912.

BROOKLYN MINING AND MILLING COMPANY,
Appellant.
vs.
CHARLES C. MILLER, ET AL.,
Appellees.
No. 144.

Appeal from the Supreme Court of the Territory of Arizona.

BRIEF ON BEHALF OF APPELLANT.

THOS. C. JOS,
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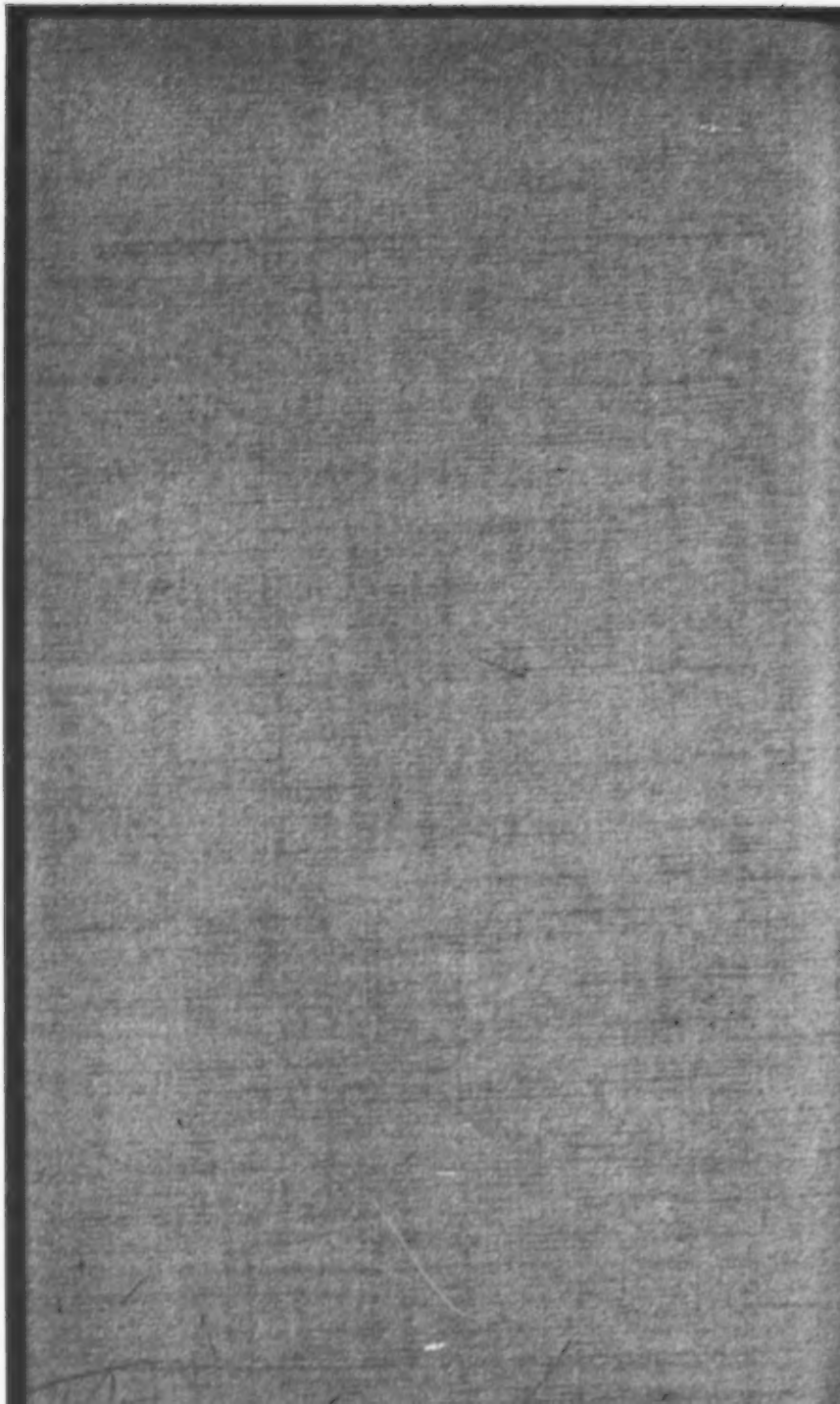
F. S. HOWELL,
Of Counsel.

JOHN J. HAWKINS,
Attorney for Appellant.



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STATEMENT.

This is an appeal from a judgment of the Supreme Court of the Territory of Arizona rendered April 2nd, 1910 (trans., 134-135), modifying and affirming the judgment and decree in equity of the District Court of the Fourth Judicial District of Arizona, dated April 24th, 1909, rendered by Mr. Justice Sloan, at Prescott, which decree is set out on pages 40 and 41 of the transcript.

The suit was brought by appellant against appellees upon a contract in writing dated August 27th, 1907, seeking the specific performance thereof. The contract sued upon (trans. 2) is as follows:

"Whereas, An action is now pending in the District Court of Yavapai County, Arizona, entitled Brooklyn Mining & Milling Company, et al, vs. Charles C. Miller, Alonzo V. Miller and George B. Lasbury, which action relates to the title to the West Brooklyn, East Brooklyn and South Brooklyn mining claims located in said county and territory, and relates to an accounting for ores and minerals taken therefrom, and

Whereas, The said Charles C. Miller, Alonzo V. Miller and George B. Lasbury have made a conditional sale of the above named West Brooklyn Mining Claim for the sum of ten thousand dollars to the United Verde Copper Company, and

Whereas, An action is pending in the District Court of Yavapai County, Arizona, entitled Charles C. Miller vs. Brooklyn Mining & Milling Company for several thousand dollars claimed to be due and owing to the said Charles C. Miller for services performed by him and Alonzo V. Miller for the said Brooklyn Mining & Milling Company, and

Whereas, It is the desire of the parties connected with the foregoing causes of action to settle same and to adjust the matters of difference between said parties in connection therewith:

Therefore, In consideration of the dismissal and

settlement of the foregoing causes of action it is hereby stipulated and agreed by and between the Brooklyn Mining & Milling Company and Charles C. Miller, Alonzo V. Miller and George B. Lasbury that if the sale of the West Brooklyn Mining Claim to the said United Verde Copper Company is consummated on or before the first day of January, 1908, the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to transfer and deliver to the said Brooklyn Mining & Milling Company one hundred seventy-five thousand shares (175,000) of stock in said Brooklyn Mining & Milling Company, free and clear of all liens or incumbrance whatsoever; it being understood that said transfer of stock is to include all of the holdings of the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury in the Brooklyn Mining & Milling Company, and the said parties are to receive therefor the sum of three (3) cents per share for said stock; and in addition thereto Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to pay to the Brooklyn Mining & Milling Company the sum of eight thousand five hundred dollars ($8,500.00) out of the proceeds derived from the sale of the said West Brooklyn Mining Claim; in addition thereto the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to convey all of their right, title and interest in and to the East Brooklyn, South Brooklyn, North Brooklyn, Empress and Midway mining claims, and said transfers shall contain the warranty that the assessment work has been done for the year 1907 upon the Empress, Midway and North Brooklyn and the said Brooklyn Mining & Milling Company shall pay the said assessment work at its reasonable value. The said Charles C. Miller, Alonzo V. Miller and George B. Lasbury agree to do the assessment work for the year 1907, on the East and South Brookyn mining claims, and said assessment work so to be performed is to be paid for by the Brooklyn Mining & Milling Company at its reasonable value. It is further stipulated and agreed by and between the parties hereto that if for any reason the sale of the West Brooklyn claim to the United Verde Copper Company by the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury shall not be consummated on or before the first day of January, 1908, then the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to convey to the Brooklyn Min-

ing & Milling Company all of their right, title and interest in and to the West Brooklyn, East Brooklyn, South Brooklyn, North Brooklyn, Empress and Midway mining claims, and the assessment work on the North Brooklyn, Empress and Midway claims for the year 1907 is to be paid by the said Brooklyn Mining Company at its fair and reasonable value.

It is understood by and between the parties hereto that the foregoing does not concede or admit any of the allegations contained in the pleadings of said causes of action, but the agreement is entered into for the purpose of adjusting the matters of difference between said parties and avoiding further costs and expenses to the parties hereto.

In witness whereof, we have hereunto set our hands this 27th day of August A. D. 1907.

C. C. MILLER,
A. V. MILLER,
G. B. LASBURY,
BROOKLYN MINING & MILLING COMPANY,
By CHAS. W. PEARSALL, President.

It will be seen that this contract was in the alternative which we interpret as follows:

Differences had arisen between the mining company and some of the defendants, concerning the ownership of some of these claims, prior to the date of the contract. The contract was to settle those differences. The first alternative was: The Millers had represented to the Brooklyn Company that the United Verde Copper Company had conditionally bought the West Brooklyn claim, and there was at the time an action pending entitled *Miller vs. Brooklyn Mining & Milling Company* for services and also an action against Millers by the company to establish its ownership of the East Brooklyn, West Brooklyn and South Brooklyn claims. So it was agreed that if the sale to the Verde Company was "consummated on or before the 1st day of January, 1908,"

defendants would transfer to the Brooklyn Company 175,000 shares of stock at 3c per share, and also pay to the Company $8,500.00 "out of the proceeds derived from the sale of the said West Brooklyn mining claim" to the United Verde Company. In addition, defendants were to convey the East Brooklyn, South Brooklyn, North Brooklyn, Empress and Midway claims, and do certain assessment work.

In case the sale to the United Verde was not "consummated," the other alternative was to be effective and the following was to be done:

Defendants were to convey to plaintiff all of these claims, including the West Brooklyn, and certain assessment work was to be paid by plaintiff. It was the contention of plaintiff, when the suit was brought that the sale of the West Brooklyn to the Verde Company had not been consummated and it was therefore entitled to a transfer from defendants of the West Brooklyn, and other claims.

PLEADINGS—HOW FORMED.

On February 18, 1908, plaintiff's complaint was filed, asking for specific performance, because of failure to consummate the sale to the Copper Company. (Trans. 1-10.)

Defendants answered, (trans. 10-15), and plaintiff replied, (trans. 15-28.) In this state of the record, plaintiff, on December 27, 1908, asked for a continuance, which was granted until March 1, 1909, in these terms, (trans. 44):

> "The Court, considering the motion and affidavits, orders that trial herein to be continued to March 1, 1909, and that costs of continuance be taxed to plaintiff."

On March 25, 1909, parties appeared for trial, whereupon defendants filed an amended answer and cross-complaint (trans. 10-15). On March 23, 1909, (trans. 28) plaintiff filed reply to amended answer and cross-complaint (trans. (15-28). On March 25th, the same day defendants filed their last pleading, (trans. 45), the Court ordered that the reply filed March 23, 1909, "shall be considered and treated as a reply to the amended answer and cross-complaint of the above named defendants and of Chas. C. Miller No. 2 as guardian *ad litem* of defendant, George Miller, a minor, filed herein on March 25, 1909." On March 25, 1909, (trans. 38) defendants moved to strike so much of plaintiff's reply as related to a prior judgment of the District Court of Douglas County, Nebraska, the motion also containing defendants' replication (trans. 29-38). On March 25, 1909, the motion, and the demurrer therein contained, were presented. We quote from the action of the Court thereon, (trans. 45):

"This cause came on to be heard upon the defendant's motion to strike and demurrer to plaintiff's answer to defendant's cross-complaint, and the court, having heard the argument of counsel reserves his ruling."

No direct ruling was ever made on that motion and demurrer, but the whole question considered by the Court on final submission (trans. 40-41). Act. p. 40:

"The cause was tried to the Court upon plaintiff's amended and supplemental complaint, the amended answer and cross-complaint of defendants * * * and plaintiff's reply to said amended answer and cross-complaint, together with said defendants' motion to strike, and replication addressed to said reply."

The trial Court, (trans. 41, par. 5) adjudicated the claims of the plaintiff under the Nebraska decree as follows:

"That plaintiff is not entitled to have or recover anything herein under, by virtue, or by reason, of, that certain decree described in plaintiff's reply to defendants' cross-complaint herein, rendered by the District Court of Douglas County, State of Nebraska; that the commissioner's deed made under and pursuant to said decree is void and of no force or effect and that said deed does not constitute a cloud upon the title to the 'West Brooklyn' Mining claim."

The Nebraska decree was nullified, thereby taking from plaintiff everything—every right thereby secured to it, adjudicating the issue presented by plaintiff's reply, ignoring the motion to strike and dealing with the Nebraska decree as one of the issues which the Court felt bound to determine.

The trial Court, having thus dealt with the Nebraska decree on the merits, necessarily and in legal effect, overruled the motion to strike. The reason assigned in the motion for striking the Nebraska judgment from the reply was an alleged stipulation of counsel, December 22, 1908, trans. 124-125). The trial judge had before him when the reply was filed, and the motion to strike was made, and when the decree of the Court was rendered, all that had transpired in the case. The record shows several answers filed, also that when the stipulation was made the case was for trial upon issues then made. Upon the verge of the trial, March 25, 1909, the defendants saw fit to file still another amended answer, presenting new and additional issues, and the Court's action in not striking the reply will be presumed to have been based upon sufficient considerations. The answers on file when the stipulation was made, did not assert ownership of the West Brooklyn

in defendants, nor seek to quiet their title thereto. An answer subsequently filed, as well as the one filed still later on, to-wit: on March 25, 1909, (trans. 14, pars. 2 and 3 of the answer) presented the additional issue "that cross-complainants above named are the owners, entitled to the possession and in the possession" of the West Brooklyn, and that the Brooklyn Company "makes some claims to said mining claim adverse to these cross-complainants." The prayer of these answers, different from all others, asks that cross-complainants' estate in said mining claim be established, and that the Brooklyn Company "be forever barred and estopped from having or claiming any right or title to said premises adverse to said cross-complainants." In its reply to the first of these answers plaintiff, for the first time, brought the Nebraska judgment into the case. At the time the stipulation for continuance was entered into, defendants' answer asserted no claim of absolute ownership of the West Brooklyn mine, and asked for no affirmative relief. The amended answer filed after the continuance was, in substance, a suit by defendants against plaintiff, in the pending suit, based on defendants' alleged absolute ownership of the West Brooklyn, and seeking a decree against plaintiff quieting their title thereto. It was for the plaintiff then to plead to the suit within the suit. We never agreed not to plead to this new suit. The stipulation was entered into, with reference to, and in view of the issues then formed for trial, and consequently should not bind plaintiff upon a new cause of action thereafter presented, not in the contemplation of either party when the stipulation was made.

SYNOPSIS OF THE DECREE OF TRIAL COURT.

The Arizona case was tried on the foregoing pleadings and state of facts and the Court rendered its decision, (38-39, trans.) holding the contract binding between the parties, yet denying the relief sought, (trans. 40-41) and gave the defendants an opportunity to make a contract of a sale of the West Brooklyn to the United Verde Company, the decree being in the alternative, as follows:

"1. That within thirty days (30) from the date hereof plaintiff shall file its written consent that this decree conditional upon *a sale* of the 'West Brooklyn' Mining claim to the United Verde Copper Company, as hereinafter provided shall become final, irrevocable and non-appealable, and consenting that said defendants, within the time hereinafter stated, may make a *sale* or *binding contract* therefor, of the 'West Brooklyn Mining claim to the United Verde Copper Company, free and clear of all claims and litigation on the part of plaintiff," etc.

This decree provides for "a" sale, not "the" sale mentioned in the contract.

2. That if plaintiff fails or refuses to file said consent and waiver within thirty (30) days, its action herein shall stand dismissed.

3. If within ninety (90) days from the date thereof, defendants shall consummate or make *a binding contract* for the sale of the West Brooklyn to the United Verde Company, and pay over, or tender to plaintiff the money, stocks, deed and proof of assessment work, as provided in the contract of August 27, 1907, then the decree will "forthwith become final, irrevocable, and non-appealable," and "plaintiff shall be *forever barred and*

estopped to claim any *right*, title or interest in or to said West 'Brooklyn Mining' Claim."

4. If plaintiff within the period aforesaid shall file its written consent and waiver, as above provided, and defendants have failed to make such sale or binding contract to the United Verde Copper Company and to pay over and deliver or tender the money, etc., within said period of ninety (90) days, then defendants shall forthwith execute and deliver to plaintiff a valid and sufficient deed conveying to plaintiff the West Brooklyn claim as mentioned in the agreement of August 27, 1907, and said agreement to be fully carried out by all the parties to this decree.

5. That the plaintiff is not entitled to have or recover anything under or by virtue or by reason of the certain decree described in plaintiff's reply to defendants' cross-complaint rendered by the District Court of Douglas County, State of Nebraska; that the commissioner's deed, made under and pursuant to said decree is void and of no force and effect and that said deed does not constitute a cloud upon the title to the West Brooklyn Mining claim.

6. That plaintiff is not in any event entitled to an accounting herein.

On appeal to the Supreme Court of Arizona, that Court, April 2, 1910, modified and affirmed the decree of the trial court. (trans. 126-135). Application for appeal was made from the Supreme Court of Arizona to this Court, and the Territorial Supreme Court made special findings. (Trans. 147-155).

ASSIGNMENTS OF ERRORS. (TRANS. 142.)

1.

The Supreme Court of the Territory of Arizona

erred in modifying the decree of the trial court, and in affirming the same as so modified.

2.

The Court erred in holding the complaint of appellant should be dismissed for want of equity.

3.

The Court erred in holding that appellant had no right to compel specific performance of the contract declared on, and that it was itself at fault in not dismissing its suit No. 4541 before January 1, 1908, and that it thus prevented appellees from consummating a sale of the West Brooklyn Mining claim to the United Verde Copper Company prior to that date; for the reason that the findings and special verdict of the Court show that said suit was instituted by Chas. W. Pearsall in behalf of himself and other stockholders of appellant, against the Millers and Lasbury, and the Company in December 1906, for the purpose of having it declared that they, the Millers and Lasbury, held the legal title to the West Brooklyn, East Brooklyn and South Brooklyn Mining Claims in trust for appellant, and to require them to convey said claims to the Company. At this time the Millers and Lasbury were in control of the Company, and this complaint was what is termed a minority stockholders' action to protect the rights of the Company. In July 1907 Pearsall and other stockholders having, at an election of the stockholders of the Company, acquired control of the Board of Directors of the Company, filed an amended complaint in this action No. 4541 naming the appellant as plaintiff against the Millers and Lasbury as defendants. C. C. Miller in May 1907, brought an action for $5,000.00 against the Company. For the purpose of disposing of and compromising this litigation the contract sued on by appellant was entered into. This contract was entered into "in consideration of the dismissal and settlement of the said causes of action." This contract was a reciprocal contract, binding on both parties, and from the date of its execution, August 27, 1907, both of said causes of action were extinguished and dismissed and it was error in the Court not to so hold.

It was manifest error in the Court to hold that be-

cause formal dismissal of said action in open Court was not made until February 15, 1908, that a consummation of a sale of the West Brooklyn claim to the United Verde Copper Company was thereby prevented, for the reason that if said fact had existed appellees could have applied to the Court in said action for a formal dismissal of same and an exhibition of said contract would have secured such relief, if such fact existed.

4.

It was manifest error for the Court to affirm the judgment and decree of the lower Court and dismiss appellant's complaint for the reason that the Court finds that no sale of the West Brooklyn was consummated prior to January 1, 1908, by appellees to the party mentioned in the contract, and the effect of said judgment is to take appellant's property and give it to appellees without any remedy on the part of appellant ever to recover same or the value thereof.

5.

It was manifest error in the Court to hold "in September 1906, Miller and Lasbury gave an option to the United Verde Copper Company for the purchase of the West Brooklyn and White Rock claims (the latter does not figure in this suit) for twenty thousand dollars. The term of this option does not definitely appear, but it was extended at different times and kept in force up to January 1, 1908"; for the reason that the option is set out at length in the record as Appellant's Exhibit "O", and is the only option given, and the same was extended to January 1, 1908, verbally, and the testimony of Miller and Clark (the latter representing the United Verde Copper Company) shows conclusively that Miller would not sell the West Brooklyn alone for $10,000.00 unless Clark purchased for the United Verde Copper Company the White Rock claim (which was the property of the Millers) for a like sum of $10,000.00 prior to January 1, 1908. C. C. Miller says: "The West Brooklyn was never referred to as a single claim. When they bought, they bought both claims; when they pay for it, they pay for both claims." Clark says a deed for West Brooklyn and White Rock at $20,000.00 for the two claims was sent him by the attor-

neys prior to January 1, 1908, and he declined same; that "prior to January 1, 1908, the matter was in the hands of the attorneys" and it was not until the spring of 1908 that the purchase of the West Brooklyn as a single claim at $10,000.00 was talked of. It is further fully shown that appellees never claimed to have been prevented by the failure of appellant to formally dismiss its suit from making such sale until they filed their amended answer and cross-complaint February 8, 1909, and again on March 25, 1909. The facts and findings show that on January 2, 1908, consummation of the sale of the West Brooklyn was claimed and a tender of the performance of the obligations of the appellees under the agreement of August 27, 1907, was made. Appellant declined the tender (as the Court finds) on the ground that it did not fully comply with the terms of the agreement. No claim was made then that they had been prevented from selling to the United Verde by the failure upon the part of the appellant to dismiss suit No. 4541. The tender did not comply with the terms of said contract for the reason that no sale had been consummated and the Court so found, and the judgment and decree was erroneous and should have been in favor of appellant.

6.

It was manifest error for the Court to hold that appellant was entitled to no rights by virtue of the Nebraska judgment, for the reason that the same is a personal judgment in favor of appellant against George B. Lasbury and Ada M. Miller adjudicating the rights of the respective parties under said contract, and, as such judgment of a sister state, was entitled to full faith and credit.

7.

It was manifest error for the Court to hold that appellant could not plead the Nebraska judgment by reason of a stipulation regarding a continuance granted in December 1908, for the reason that at such time the state of the pleadings showed that appellees did not claim any title to the West Brooklyn and the other claims mentioned in the contract, but had theretofore tendered per-

formance and if performance had not been made they were to convey to appellant, and if it had been made they were to convey the other claims mentioned in the contract to appellant and pay the consideration mentioned in the contract, received for West Brooklyn, to appellant; and said judgment was pleaded only to the answer and cross-complaint filed in March 1909.

8.

It was error for the Court to hold that the making of such stipulation regarding a continuance granted in December 1908, for the reason that at such time the state of the pleadings showed that the pleadings at that time.

(This is a mistake and will be pointed out later,, p. 64 of this brief.)

9.

It was manifest error for the Court not to consider the Nebraska judgment, notwithstanding the state of the pleadings, since that judgment whether pleaded or not was conclusive as between appellant and Ada M. Miller and the interests of George B. Lasbury, as to the facts:

(1) That appellant had performed all the obligations required by the contract to be by it performed;

(2) That no sale of the West Brooklyn had been consummated between appellees or any of them, or the said George B. Lasbury and the United Verde Copper Company prior to January 1, 1908, and

(3) That the failure to dismiss the suit No. 4541 did not interfere with, hinder or prevent the consummation of such sale: such finding and determination precluding further investigation of those facts as between appellant and Ada M. Miller and George B. Lasbury, and it was manifest error for the Supreme Court to find otherwise on evidence offered on the trial of the case in Arizona (where the same questions were material to the issue) notwithstanding the stipulation, and notwithstanding that the judgment of the Nebraska Court might not have been pleaded as an estoppel or *res adjudicata,* said judgment of the Nebraska Court having been properly admitted in evidence upon the trial though improperly pleaded or not pleaded at all.

Two of the issues to be tried in the Arizona Court

were whether appellant had performed all of its obligations under the contract in suit, and whether appellant had prevented consummation of the sale of the West Brooklyn Mining claim of the United Verde Copper Company. These were issues of fact in the Nebraska suit. In the Nebraska suit those issues were litigated, found and adjudicated in favor of appellant. These same facts being in issue under the pleadings in Arizona, were, under general denial, susceptible of proof by the record of the Nebraska judgment insofar as the same affected the interest represented in the Nebraska suit by or through Ada M. Miller and George B. Lasbury.

The record of the judgment in the Nebraska suit, being admissable in evidence, without being specially pleaded, was, as an evidential fact, conclusive of the matters put in issue and actually determined by the Nebraska judgment.

10.

The judgment and decree of the Court is contrary to law and equity.

11.

The judgment of affirmance dismissing appellant's complaint is contrary to equity in this—that appellant from the time of making the contract abandoned its cause of action against appellees and has dismissed the same. The consideration of said contract concludes appellant from any remedy; it loses all of its property, and the decision of the Court, in effect, gives it all to appellees.

12.

The judgment of the Court is contrary to the facts in the case as found by the Court, in this—that the Court finds that appellees have the legal title to the West Brooklyn and other claims mentioned in the contract, and that the basis of appellant's title is the contract sought to be enforced by appellant, and a dismissal of the complaint leaves appellant entirely remediless—stripped of all its property and the same given to appellees.

The assignments of errors are set out at length on pp. 142-145 of the transcript and will be discussed under

points showing in what the decree and judgment is erroneous.

BRIEF OF ARGUMENT.

The Exact Issues.

Complaint. * * It is important to know what the precise questions for decision were. The complaint (trans. 1-9) sets out, (second paragraph, trans. 2), the contract in suit, which provided, among other things, (trans. 3) "if for any reason the sale of the West Brooklyn claim to the United Verde Copper Company by said Charles C. Miller, Alonzo B. Miller and George B. Lasbury shall not be consummated on or before the first day of January 1908, then the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to convey to the Brooklyn Mining and Milling Company all their right, title and interest in and to the West Brooklyn, East Brooklyn, South Brooklyn, North Brooklyn, Empress and Midway mining claims." Paragraph three (trans. 4); that Miller and others represented to the plaintiffs that they had an outstanding contract with the Copper Company, giving that Company an option, in writing, to purchase the West Brooklyn claim; that plaintiff denied the right of Miller and others to sell this claim, and that they had any title thereto. Paragraph four, (trans. 5); that the sale to the Copper Company by Miller and others had not been consummated prior to January 1, 1908, and because of no sale, so much of the contract sued on as did not relate to the transfer of the West Brooklyn claim to the plaintiff became obsolete. Paragraph five, (trans. 5); that the portion of the contract sought to be enforced was the latter part commencing with the words "it is further stipulated" (trans. 3) and ending with the close of the

contract. Par. seven, (trans. 6); that the suits referred to in the contract had been dismissed and alleging performance of its other provisions by plaintiff and claiming a right in the plaintiff to receive a conveyance of six mining claims, including the West Brooklyn, and offering to pay the assessment work mentioned in the contract, and further tendering the performance of all covenants on its part to be performed. Paragraph ten, being allegations and prayer with reference to an accounting, (trans. 7) was dismissed out of the complaint without prejudice (trans. 45-46). Paragraph eleven, (trans. 8); by reason of the failure to consummate the sale of the West Brooklyn the plaintiff was entitled to a deed of conveyance, conveying to the plaintiff said six claims. Then follows the prayer for specific performance.

Answer & Cross Complaint. * * * Omitting, at this point, any reference to intermediate pleadings, we call attention to the answer upon which the trial was had, to focus the exact points in issue. The defendants filed pleadings, (trans. 10-14), entitled 'Amended answer and cross-complaint.' In paragraph one: that the defendants before January 1, 1908, dismissed suit brought by them mentioned in the contract, and demanded of plaintiff a like dismissal of suits, which was refused; that on January 2, 1908, (January 1 being a legal holiday) defendants tendered to plaintiff 175,000 shares of stock, $3,150, and an offer of a sufficient deed from Charles C. Miller, Alonzo V. Miller and George B. Lasbury, transferring to plaintiff all of the mining claims except the West Brooklyn, " said deed having been so executed and acknowledged by Alonzo V. Miller prior to his death and delivered by him for the purpose of complying with said agreement of August 27, 1907," also an affidavit showing the assess-

ment work. This tender is followed by the specific allegation, (trans. 11, par. 2): "That *such* tender was in *full compliance* with *all* of the *requirements* of said agreement of August 27, 1907"; that the tender so made had been renewed and refused, (trans. 12); admit the death of Alonzo V. Miller, intestate, in Arizona, in December, 1907, leaving certain heirs surviving; admit and *aver* that on August 27, 1907, Charles C. Miller and Alonzo V. Miller were *owners* of interests in said six mining claims, admit litigation referred to in the contract, and the execution of the contract; admit that Copper Company held a contract for the purchase of the West Brooklyn claim and deny all other allegations. Further answering, (trans. 12-13): defendants *deny default on their part* in carrying out the contract; admit that they *refused to convey* the West Brooklyn to plaintiff; deny refusing to convey the other five mining claims, or either of them, *or that they refused to perform* the contract; allege readiness at all times to *fully perform* and that frequent *tenders* of *performance* had been made, which were always refused; "that the failure of defendants to have *fully* and *completely transferred and delivered* said West Brooklyn Mining claim to the United Verde Copper Company, *and to have received all of the money in payment therefor* on or before January 1, 1908, was caused solely by plaintiffs' failure and refusal to perform its part of the contract, dated August 27, 1907, *by dismissing its suit* pending at the time said contract was entered into." *Deny plaintiff's performance of contract;* dismissal of a previous suit, and other unimportant matters. Further answering said complaint(trans. 14) by the way of cross-complaint, defendants *aver ownership in them,* and right of possession, of the West Brooklyn claim, alleging that complainant *claims some interest adverse to cross-complainants* and

praying for judgment establishing cross-complainants' estate in the West Brooklyn Mining claim, and *asking that complainant be barred from any claim therein.*

Reply. * * * The reply (trans. 15-17), denied all allegations of amended answer and cross complaint not previously admitted, and set up the *Nebraska* suit, proceedings and judgment. (Exhibit "A," trans. 18-28).

POINT 1.

Under the issues presented, and the findings of both lower Courts that no sale had been consummated of the West Brooklyn Claim to the United Verde Copper Company by defendants prior to January 1, 1908, the plaintiff was entitled to specific performance of the contract in suit, without regard to whether it prevented such consummation or not.

(Assignments of error No. 1, 2, 3, 4, 5, and 10.)

These pleadings boiled down to the real import mean:

1. Plaintiff alleges performance of all conditions in the contract by it to be performed; and denies consummation of sale.

2. Defendants deny these allegations.

3. Defendants allege complete performance of the conditions of the contract by them to be performed.

4. Defendants allege tender, which tender they claim to have been in full compliance of their obligations under the contract.

5. Defendants were not in default in carrying out their obligations in the contract.

6. The failure of defendants "*to have fully and completely transferred and delivered* said West Brooklyn Mining claim to the United Verde Copper Company and *to have received all of the money in payment therefor* on or before January 1, 1908, was caused solely by plaintiff's failure and refusal" to dismiss its suit. (The only thing prevented by plaintiff was "transfer," "delivery" and "receive all of the money,"—not that it prevented

full compliance by defendants which they say they performed, but limited the prevention of compliance by defendant merely to transfer, delivery and collection.)

This was not sufficient to permit evidence by defendants that they had *fully* performed, but merely that they had not been able to *transfer, deliver* and *collect.*

Philip Schneider Brewing Co., v. American Ice Machine Co. (8 C. C. App.), 77 Fed., 138, 142-4.

We quote from that case, page 143:

"In answer to the general averment in the complaint that the 'plaintiff has fully complied with and performed all and singular the terms and conditions' of the contract on its part, the answer 'denies that the plaintiff has fully complied with and performed all and singular the terms and conditions of said contract.' This denial is clearly a negative pregnant, and raised no issue. *James v. McPhee,* 9 Colo. 491, 13 Pac. 535; Bliss Code Pl.. Sec. 332. This denial would be literaly true if the plaintiff had failed to perform the contract in some trivial or immaterial respect, whereas a substantial compliance with the contract would entitle the plaintiff to recover; and this denial does not negative the fact that there was such a compliance. But we do not rest our decision upon this ground. It may be assumed that this clause of the answer, standing alone, was a good general denial, and that, if the defendant had said nothing more in its answer, it would have raised an issue as to the sufficiency of every part of the plant. But the defendant was not content to rest on this general denial. It afterwards chose to make its denial specific, and to point out with great particularity the parts of the ice machine which it claimed were defective. The dubious general denial is followed up by this averment: 'Defendant alleges that the plaintiff failed and neglected to perform the contract in the complaint set forth, accord-

ing to the terms thereof, in the following particulars.' Here follows a particular specification of the part of the machine alleged to be defective which we have set out in full in the statement. The counterclaim set up in the defendant's answer is based on the same alleged defects in particular parts of the machine. Neither in the specific denials nor the statement of the counterclaim is there any mention of the engine or compressor, or any hint or suggestion that either was defective. Under this state of the pleadings, the plaintiff was not required to move for a more specific statement, or a bill of particulars. If such a motion had been made, it must have been overruled upon the ground that the defendant had stated with great particularity the parts of the machine which it claimed to be defective. The plaintiff had a right to rely upon this specification of defects. By reference to the contract it will be seen that the manufacture of ice requires an extensive and elaborate machine, composed of numerous parts. The defendant had been operating the machine for some time before it filed its answer. It had knowledge, therefore, of all its defects, large and small; and when it undertook to particularly specify them the presumption is that it specified them all, and the plaintiff had a right to rely upon this presumption."

Particularly calling attention to the quotation above, on page 143, as follows:

> "Neither in the specific denials nor in the statement of the counterclaim is there any mention of the engine or compressor, or any hint or suggestion that either was defective,"

permit us to say that neither in the specific denials nor in the statement of how the defendants were prevented from performing all their duties, is any mention of preventing a *sale* to the Copper Company, by any of plain-

tiff's conduct. Had plaintiff moved for a more particular statement of the manner in which plaintiff prevented consummation, it must have been overrruled because the defendants had stated "with great particularity" wherein they had been obstructed by the acts of the plaintiff. The defendants had full knowledge of what they had done with reference to a consummation of the sale and what acts of plaintiff had taken place and what those acts prevented defendants from doing; and when they "undertook to particularly specify them, the presumption is that they specified them all, and the plaintiff had a right to rely upon this presumption."

At page 144 it is said:

> "The plaintiff was thus advised, as was its right, of the precise issues it had to meet. It was not required to come prepared to meet any others. In this state of the pleadings it would be a great hardship on the plaintiff to require it to meet charges or defects in other parts of the machine, made for the first time at the trial."

In the above case, at page 145, the Court quoted from *Kahnweiler v. Insurance Company*, (8 C. C. A.), 67 Fed., 483, as follows:

> "If the defendant intended to rely upon the nonperformance by the plaintiffs of one or more of the numerous conditions of the policy, it should have pointed them out specifically, and alleged their breach. In no other way could it be known to the parties or the court what issues were to be tried. Under the Code, when a defendant relies upon a breach of a condition precedent in a contract as an excuse for not performing the contract on his part, he must set out specifically the condition and the breach, so that the plaintiff and the court will be advised of the issue to be tried. Bliss Code Pl. (3d Ed.) Sec. 356a; Nash Pl, pp.

300, 302, 782. In the case of *Preston v. Roberts*, 12 Bush, 570, 583, the Court of Appeals of Kentucky said: 'The plaintiff being expressly authorized to plead in that manner (general performance of conditions precedent), the defendant must, if he relies upon the fact that any of the conditions precedent has not been performed, specify the particulars in which the plaintiff has failed (Newm. Pl. & Prac. 510, 511; *Railroad Co. v. Leavell*, 16 B. Mon. 362), thus confining the issue to be tried to such particular condition or conditions precedent as the defendant may indicate as unperformed.' See, to the same effect, *Gridler v. Bank*, 12 Bush. 333. The cases of *Hamilton v. Insurance Co.* 136 U. S., 242, 10 Sup. Ct., 945, and *Hamilton v. Insurance Co.* 137 U. S., 370, 11 Sup. Ct. 133 arose in a code state, and in these cases the defendant set up the condition precedent relied upon as a defense, and specifically alleged its breach, and this is believed to be the uniform practice in all code states. It is also the practice in England, under a statute which, like our codes, permits a general averment of the performance of conditions precedent by the plaintiff. Under that statute, where such a general averment is made in the declaration, any condition precedent, the performance or occurrence of which is to be contested, must be distinctly specified, and its performance negatived in the defendant's answer."

The answer of defendants presented no issue that a sale of the West Brooklyn had been prevented by plaintiff.

Pleadings are to be construed against the pleader.

We pass by the admission that the plaintiff failed of its duty "by dismissing its suit," as it is apparent the pleader intended to say " by not dismissing its suit." Be that as it may. An examination of the whole of defendants' pleadings shows deliberation in the choice of

words and that defendants were endeavoring to hold to two positions—inconsistent in themselves. First:—They had fully performed all that the contract required of them by a tender which they alleged was " in full compliance with all the requirements of said agreements." (Trans. 11). Second:—Plaintiff had prevented the *transfer and delivery* of the West Brooklyn to the Copper Company and also prevented them from collecting "*all* of the money in payment thereof." (Trans. 13). This is accented by the testimony of C. C. Miller when he attempts to expand into a part payment, a loan made to him, (not to all the defendants) by the Copper Company, of $2,000.00 for which the Copper Company took a due bill, and later deducted it from the purchase price of silica supplied under the lease heretofore mentioned, (trans. 93-96).

The pleadings are strained and inharmonious, and the testimony adduced by defendants is forced and misapplied. The whole makes a jumbled effort, resulting in confusion.

The contract is construed by them so as to permit them to dismiss their suit so late as January 2, 1908, but in a way that plaintiff must dismiss its suit at a time (not mentioned) which would permit them to make a new contract of sale of the West Brooklyn alone, for $10,000.00 before January 1, 1908. They then offer pleadings which may be construed as pleading full compliance in one breath and prevention of compliance in the next.

If a dismissal of their suit on January 2, 1908, was deemed a compliance with their agreement, why was it not sufficient for the plaintiff? If sufficient for the plaintiff, how did it prevent, under the pleadings, a consummation of the sale?

In this connection it is interesting to note that the tender of $3,150.00 made in open Court on January 2,

1908, was the money of Miller, and it was at that time the demand was made upon plaintiff to dismiss its suit. If a dismissal at that time would be a compliance with plaintiff's duties under the contract how did a failure to dismiss prevent a sale, when Mr. Clark, the manager of the Copper Company was absent from home for a week or more until the morning of January 2, 1908, (trans. 114)? Defendants were forcing the whole defense in order to secure for themselves the values in the West Brooklyn.

It is obvious that defendants were seeking the "whip-hand" over both the Copper Company and the plaintiff, by both pleadings and proofs.

Both Arizona Courts found (trans. 130): "that the sale of the West Brooklyn to the United Verde by the defendants had not in fact been consummated on or before January 1, 1908, but that the failure to consummate such sale was because of the failure and refusal of the plaintiff to dismiss the action."

The latter part of this finding is not within any issue presented for determination. The only thing the defendants claim for the pending suits was, as shown in their answer (Trans. 13), "that the failure of the defendants to have *fully and completely transferred and delivered* said West Brooklyn Mining Claim *and to have received all of the money in payment therefor* on or before January 1, 1908, was caused solely by plaintiff's failure and refusal to perform its part of the contract dated August 27, 1907, by *dismissing its suit,*" etc. That is not equivalent to an allegation that the plaintiff prevented the consummation of the sale. *A full and complete transfer and delivery* and the *collection of the consideration money therefor* is no part of the sale itself.

In the same breath that defendants demand dismissal of plaintiff's suit, defendants were claiming a consummation of the sale to the Copper Company, so the Su-

preme Court says, quoting from findings (Trans. 149, last paragraph):

> "On January 2, 1908, the case of Miller against the Brooklyn Company, No. 4608, was dismissed. On the *same date* defendants filed in action No. 4541 their written motion to dismiss said action. *Consummation* of the sale of the West Brooklyn to the United Verde Company *was claimed*, and a tender of performance of the obligation of the Millers and Lasbury under the agreement of August 27, 1907, was made."

According to this finding of the court, Millers were taking the position, on January 2, 1908, that the sale had been, in fact, consummated, and, later, that plaintiff prevented that very thing. On January 2, 1908, defendants planted their right to demand of plaintiff a performance of the contract, acceptable and desirable to them, upon the express ground of "consummation."

In their pleadings they still undertook to hold that position, and, at the same time, to avoid glaring inconsistency, undertook to mask another, but different, issue by alleging a prevention by plaintiff of a transfer and delivery, etc., to the Copper Company of the West Brooklyn.

Their position always was "consummation" until Lasbury and Mrs. Miller were routed therefrom in the Nebraska court. Whether we interpret defendants' pleadings by rules of law or their understanding of them, we reach the same conclusion. Illustrative of this point see the Nebraska answer (Trans. 25). In paragraph three (3) of the answer signed by Hall and Stout, attorneys for Ada M. Miller and George B. Lasbury, this language is found:

> "Said answering defendants further say that each, every, and all conditions in said contract to be performed by said C. C. Miller, A. V. Miller and

G. B. Lasbury, by them were performed within the time specified therein, *and these answering defendants allege the fact to be that the sale of said property mentioned in said contract to be made to the United Verde Copper Company was fully consummated within the time therein specified and the property therein mentioned duly and properly conveyed to said United Verde Copper Company,"* etc.

The term "sale" has a fixed and well defined meaning, both in law and equity. "It means a contract between parties to take and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought and sold." (*Williamson vs. Berry,* 49 U. S. (8 Howard) 495, Syl. 13, 544.) The contract in suit provided that, whereas the defendants "have made a *conditional* sale," (Tr. 2) and "if the sale of the West Brooklyn mining claim to the said United Verde Copper Company is consummated on or before January 1, 1908," certain things are required. (Tr. 3.)

Further, "if for any reason the sale * * * shall not be consummated" the defendants are to deed to the plaintiff the West Brooklyn.

Taking the words "conditional sale" in connection with the word "consummated" as used with reference to the whole context, it would seem plain the effect is that, if the "conditional sale" shall become absolute, the West Brooklyn is to go to the Copper Company; otherwise, to plaintiff. It was not with the purpose of modifying the fixed and well defined meaning of the word "sale" that the word "consummation" was used, but to provide if a conditional sale became a sale absolute—"a contract between the parties to take and pass rights of property for money which the buyer * * * promises to pay to the seller for the thing bought and sold"—the West Brooklyn would not be deeded to plaintiff.

> "A sale is a contract for the transfer of property from one person to another for a valuable consideration, and these things are requisite for its validity, viz: the thing sold, which is the object of the contract, the price, and consent of the contracting parties."

2 Kent Com. 468.

Micks et al. vs. Stevenson, (Ind.) 51 N. E. 492, 493.

In the case just cited a written contract was entered into between one Stevenson and one Micks and others, wherein Stevenson agreed to negotiate a sale of property, and this language is used, p. 492, col. 2:

> "It is agreed that, upon the consummation of said sale at a sum first to be approved and accepted by the parties of the second part, that the said parties of the second part shall pay to said party of the first part the sum of $1,000."

A contract for a sale was entered into between an Electric Company and Micks, as first parties, and one Collins, as second party. By the provisions of the contract Collins was to pay $2,000 cash, $8,000 December 15, 1896, and further payments of stated amounts at stated times, and he was to assume some existing indebtedness. That the property sold to Collins was not to be transferred until the $8,000 due December 15, 1896, was paid. After that contract was executed Stevenson sued for his $1,000, claiming that it was due him because of the "consummation of said sale." Micks defended against that suit because "no sale was consummated under the contract." The Indiana court held (syl.):

> "That the sale was 'consummated' so as to entitle the agent to commissions for affecting it, although the conditions were never complied with."

Had the Millers and the Copper Company entered

into a contract for the sale of the West Brooklyn and had fixed the terms of sale and the times of the payment of the money at such times as these suits could be dismissed, or at such time as the Millers could furnish a good title because of the death of Alonzo V. Miller, that would have constituted a sale.

Beardsley vs. Beardsley, 138 U. S. 262.

In that case Mr. Justice Brewer said (Syl.):

"The appellants signed and delivered to the appellee a paper in which he said, 'I hold of the stock of the Washington and Hope Railway Company, $33,250, or 1,350 shares, which is sold to Paul F. Beardsley (the appellee) and which, though standing in my name, belongs to him, subject to a payment of $8,000, with interest at same rate and from same date as interest on my purchase of Mr. Alderman's stock.' *Held,* that this was an executed contract by which the ownership of the stock passed to the appellee, with a reservation of title simply as security for the purchase money."

The pleadings of the defendants are uncertain as to which of their theories is relied upon.

"A pleading should be construed with reference to the general theory upon which it proceeds; and a pleading should not be uncertain as to which of two or more theories is relied upon."

Phillips, Code Pl. Sec. 354. *First Nat. Bank vs. Root,* 107 Ind. 224, 8 N. E. 105. One will not be allowed to plead inconsistent defenses."

Keenan vs. Sic (Neb.) 135 N. W. 841, 843, Col. 2.

Columbia Nat. Bank vs. Ger. Nat. Bank (Neb.), 77 N. W. 346, Syl. 6.

POINT 2.

Appellant (Plaintiff) was guilty of no default, under the terms of the contract set up in its complaint, which would warrant the lower Courts in refusing it a decree by way of specific performance ordering a conveyance to it of the West Brooklyn and other Mining Claims mentioned in its complaint, and the refusal of such relief and the dismissal of Plaintiff's (Appellants) complaint was reversible error. (Assignments of error 1, 2, 3, 4, and 10).

The fact that the West Brooklyn was not sold entitled the appellant to an enforcement of the alternative portion of the contract to the conveyance of the West Brooklyn and other claims, unless appellant did something to prevent a consummation of the sale to the Verde Company. Both lower courts based refusal to enforce, upon the sole ground that appellant had not dismissed its suit against some of the defendants (appellees), mentioned in the contract, prior to January 1, 1908. We submit that this is no sufficient reason because:

(A.) THE FORMAL DISMISSAL OF THE COMPLAINT IN THE CASE REFERRED TO IN THE CONTRACT, THE CASE OF THE BROOKLYN COMPANY VS. MILLER, ET AL, WAS NOT A CONDITION PRECEDENT TO BE PERFORMED BEFORE THE CONSUMMATION OF A SALE OF THE "WEST BROOKLYN" CLAIM TO THE UNITED VERDE. IF IT IS TO BE MAINTAINED THAT THE CONTRACT ITSELF DID NOT OPERATE TO DISMISS THE CASE, APPELLANT COULD FORMALLY DISMISS AT ANY TIME BEFORE DECREE FOR SPECIFIC ENFORCEMENT.

The only condition precedent in the contract relates to the consummation of the sale on or before January 1, 1908, to the United Verde, of the "West Brooklyn," all others being such as could be performed at any time before decree.

Time was not of the essence of the covenants to dismiss the suits, but was of the essence, as to the consummation of the sale to the United Verde. No time was fixed for dismissals.

The practical construction placed upon the contract as to the dismissal of suits, by defendants, was that the suits were not a hindrance, but could be dismissed as late as the last minute in the day of January 2, 1908, which defendants did. We submit, as a matter of law, that the pending suit in Arizona, Brooklyn Company vs. Miller, et al, was not a legal obstruction, because the contract sued upon made no such provision. If a sale, i. e. a binding contract, had been made, the contract in suit, if placed upon record, would constitute a link in the title of the Copper Company and a fortification of its title, instead of clouding it.

Where time is not of the essence, the failure of a party to perform a condition will not defeat specific enforcement.

> "It is now thoroughly established that the intention of the parties must govern; and if the intention clearly and unequivocally appears from the contract, by means of some express stipulation, that time shall be essential, the time of completion or performance or of complying with the terms, will be regarded as essential in equity as much as at law."

Pom. Con. p. 462, sec. 390.

Whiteman vs. Perkins, 56 Neb. 181, 185.

If time be not of the essence of a portion of the contract, performance of such things as are not controlled by time, may be at any time before decree.

Seaver vs. Hall, 50 Neb. 878, 882, and Syl. 3.

King vs. Gsantner, 23 Neb. 797. (Storey Eq. Jur.) 777.

Defendants could put plaintiff in default only by tendering performance themselves. This they never did, although claimed by them. In that connection we find the following *finding of fact* by the Territorial Supreme Court (Trans. 149, last paragraph):

> "On January 2, 1908, the case of Miller against the Brooklyn Company, No. 4608, was dismissed. On the same date defendants filed in action No. 4541 their written motion to dismiss said action. *Consummation* of the sale of the West Brooklyn to the United Verde company *was claimed* and a tender of performance of the obligation of the Millers and Lasbury, under the agreement of August 27, 1907, was made. This tender was refused by counsel for the appellant on the ground that it did not fully comply with the terms of the agreement, and counsel again declined to dismiss the suit, No. 4541."

The opinion handed down by the Supreme Court (Trans. 126-134) states the facts as viewed by the two Arizona courts. The opinion of the trial judge is found in the transcript, pages 38, 39. We quote what may be termed the gist of this controversy:

> "It is axiomatic that before either party to a contract may obtain specific performance against the other he must show that he has, in good faith, done all that the contract requires of him, or has offered, in good faith, to do all that the contract requires of him. It is shown by the evidence and clearly appears therefrom that no sale was consummated by the defendants with the United Verde Copper Company of the West Brooklyn mining claim on or before January 1, 1908. *On the face of the record, therefore, it appears that the defendants have failed to carry out one of the terms of the agreement.* It becomes necessary, therefore, to determine whether the plaintiff is in a position to enforce,

> as against the defendants, *the performance of the conditions named in the agreement, and which, by its terms were to be performed by the defendants in the event* such sale should not have been made on or before the date mentioned. * * * The agreement was a complete settlement between the parties of all antecedent disputes and claims, and it cannot be inferred from the agreement that the pending suits were to be continued, for the agreement is absolute that they should be dismissed." (Trans. 38.)

So, as a matter of fact and law, the plaintiff was entitled, on the face of the record, to a decree for specific performance unless (within the issues) there was some good reason for denying it. That the agreement "was a complete settlement between the parties of all antecedent disputes" and the pending suits were to be dismissed without any further consideration, cannot be questioned "for the agreement is absolute that they should be dismissed." There was no time fixed for the dismissal, and we contend that, even though they should have been dismissed, as a matter of legal right, as to all parties, as soon as the contract was executed, all of the arguments of law and all of the reasoning based upon a failure to dismiss, on or before January 1st, 1908, beg the question; because even though the legal right may have been, and probably was, given either party to go into court and enforce a dismissal, time was not of the essence of these covenants. These were rights based upon a provision of the contract which did not inhere in that portion of the contract of which time was the essence, and they were separately enforceable. To illustrate: Had the Copper Company entered into a valid contract for purchase, within the provisions of their option, which included the West Brooklyn, and had ignored these suits and

withheld payment for the purchase, it would not have affected the right of either party to thereafter compel a dismissal, and would not have embarrassed the legal right of the Copper Company to have a deed to the property. The contract created a vested right for the dismissal of all of the law suits referred to, and time not being of the essence as to dismissal, is of no importance in determining the question "whether the plaintiff was in a position to enforce, as against the defendants, the performance of the conditions named in the agreement." The contract in no way ties dismissal with the sale of the West Brooklyn. The contracting parties were satisfied to rest their claims for dismissal upon their legal rights to compel the same under the agreement to dismiss, whereas, the duty to convey, to plaintiff, the West Brooklyn, rested upon no such right but upon some happening at a given time.

Referring further to the decision of the Court (Trans. 38, 39), it says it appears that certain suits were pending at the time the agreement was made which involved the West Brooklyn title; that such suit was not dismissed until February 15, 1908; that prior to January 1, 1908, defendants were endeavoring to effect a sale of the claim to the Copper Company, and the Court further says: By the testimony of Will L. Clark it is shown that the pending suit prevented such sale, and that by the testimony of the same witness Clark, the Copper Company had ever since been willing to make the purchase at $10,000. Then the Court says (Trans. 39, par. 1): "I *therefore* conclude that the plaintiff is not in a position to enforce, at this time, specific performance on the part of the defendants *for the reason that it was in itself at fault in not dismissing its litigation and thus removing any obstacle in the way of defendants negotiating and consummating a sale of the West Brooklyn mining claim* on or before January 1st, 1908."

Our criticism of, and answer to, this position taken by the Court is: (1) The Copper Company never had any right to negotiate a new sale for the West Brooklyn, but only to consummate the conditional contract of purchase theretofore entered into;(2) the proofs and findings of the Court show that the Copper Company did not have any option for the purchase of the West Brooklyn for $10,000, but on the contrary did have a written option for the purchase of the *White Rock* and the *West Brooklyn claims* for $20,000 (Ex. "O", Trans. 118-119); (3) the reason why a sale was not consummated for the West Brooklyn to the Copper Company was not the pendency of the suits, but because the Millers would not allow them to take the West Brooklyn claim at $10,000, nor would they allow the Copper Company to take either claim, without taking both, nor would they allow them to pay for either claim without paying for both.

The opinion of the Supreme Court (Trans. 127) on this subject, states: "In September, 1906, Miller and Lasbury gave an option to the United Verde Copper Company for the purchase of the West Brooklyn claim and the White Rock claim (which does not figure in this suit) for the sum of $20,000."

(B.) DEFENDANTS (APPELLEES) MADE NO PROPER TENDER OF PERFORMANCE FOLLOWING WHICH PLAINTIFF (APPELLANT) WOULD BE OBLIGED TO DISMISS ITS SUIT AGAINST MILLER ET AL ACCORDING TO THE TERMS OF THE CONTRACT.

The answer presents a certain tender by the defendants; its refusal; "that such tender was in full compliance" on the part of defendants; the repeated making of such tender; the readiness of defendants to perform and a denial of default as to defendants. It also alleged a willingness to convey all of the claims except the West Brooklyn. Certain admissions made by the answer are

material and important and should not be lost sight of, notably the admission of the death of Alonzo V. Miller on December 18, 1907 (the date for performance being January 1, 1908); that Miller died in the territory of Arizona, leaving heirs surviving him, who, at the time of the filing of this suit, were non-residents of Arizona; that a tender was made on January 2, 1908, of 175,000 shares of the capital stock of the Company, $3,150.00 in money, an affidavit of assessment work and a deed executed and acknowledged by Charles C. Miller, Alonzo V. Miller and George B. Lasbury, covering the South Brooklyn, East Brooklyn, North Brooklyn, Midway and Empress claims (Alonzo V. Miller had then been dead thirteen or fourteen days); that the purpose of the deed from Alonzo V. Miller was to comply with the contract. Such deed could pass no title from Alonzo V. Miller until actual delivery. He died in December, 1907. The deed was not an escrow deed. After that deed was made out and while Alonzo V. Miller was living he made a deed to his wife under which she claimed to own the property which was delivered to her within a day or two of his death, and which she said to witness Collins (Trans. 76-77) that "Lon had left that" (meaning the West Brooklyn) "for she and the boys for a living. She said that her son George was down there and that Charles was in the navy, but he would probably come down there and assist in working the West Brooklyn claim. This is not denied anywhere. Mrs. Miller also told Mr. Pearsall the same. (Trans. 50, folio 108.)

This shows an attempted juggle of this property to suit the convenience of the Millers and to meet their emergencies. No deeds were tendered to the plaintiff or the Copper Company from Mrs. Miller as owner, nor from the heirs of Alonzo V. Miller, to-wit: Ada M. Miller,

his widow, Charles C. Miller No. 2 and George Miller, either then or thereafter. The proofs and findings show no such tender was made. The contract called for deeds from Alonzo V. Miller, Charles C. Miller and George B. Lasbury. The deed from Alonzo V. Miller did not run to *Charles C. Miller* in order to enable *him* to close the deal, but it ran to the *Brooklyn Mining and Milling Company,* which had never consented to any such arrangement, knew nothing of its execution, and could not accept such a deed as a conveyance of title after his death. The answer then says: "That such tender was in full compliance with all of the requirements of said agreement." Also: "At the time of the making of such tender plaintiff was requested in open court to dismiss" the action pending in the name of the plaintiff against the Millers and Lasbury. The answer also says "that the tender above described has been renewed," etc., which the plaintiff always refused. (Trans. 10-14.) Alonzo V. Miller delivered the deed to C. C. Miller, his agent, attached no conditions thereto preventing a recall of the deed, and established no conditions under which it could be delivered to plaintiff (appellant).

The lodgment of a deed with an agent leaves it in the possession of the grantor and is not delivery. To speak from delivery, as an escrow, a deed must be accompanied by a binding contract; the grantor must lose control over it, and it must be delivered upon the happening, or the failure to happen, of a contingency. But the contingency must be fixed by the escrow contract and the obligations and duties of the parties to the escrow contract must be defined and fixed, so that either party may enforce the delivery of the deed as a part of the terms of the contract. Whether or not this was an escrow becomes important.

Fitch vs. Bunch, 30 Cal. 208-212.

The condition of an escrow must be fixed at the time of the deposit and not subsequently.

Blight vs. Schneck, 10 Pa. St. 285, 51 Am. Dec. 478.

A necessary element of an escrow is that, when the instrument is placed with a depositary, it should be intended to pass beyond the control of the grantor for all time.

Wittenbrock vs. Cass, 110 Cal. 1, 42 Pac. 300.

Great Western Tel. Co. vs. Lowenthal, 154 Ill. 261, 40 N. E. 318.

McDonald vs. Huff, 77 Cal. 279, 14 Pac. 499.

Fred vs. Fred (N. J. Ch.), 50 Atl. 776.

Tharaldson vs. Evereth, 87 Minn. 168, 91 N. W. 467.

It necessarily follows that defendant's tender was a nullity and did not constitute performance.

Whether the tender was, or not, a full compliance with all that defendants were to do under the contract, depends upon whether they were to do any of the things offered to be done by them unless the sale was in fact consummated before January 1, 1908. We think it is clear that unless the sale of the West Brooklyn was consummated defendants would not owe the shares of stock nor the $3,150.00, etc., to plaintiff, and for that reason no tender, without the sale, could be operative.

The tender itself, without sale, also shows that defendants did not believe it was material that a sale be consummated. That the defendants were not ready and willing at all times to perform their covenants in the contract is fairly plain to see.

The only effort to deliver a deed to the Copper Company was by mailing a deed covering both the White Rock and West Brooklyn claims under the $20000.00 option, which deed was refused by Mr. Clark. No effort was made on their part to dismiss their suit until January 2, 1908.

They borrowed the money or a part thereof, to pay to plaintiff the $3,150.00 on the last day.

Lasbury and Mrs. Miller stated in December, 1907, and January and February, 1908, that the deal was off with Senator Clark (the Copper Company), because of hard times. (Trans. 49-50, 78, 76, Folio 163, Feb. 15, 1908; 75 Folio 159, Jan. 27, 1908.

They could not give a deed to all the interests, for Alonzo V. Miller was dead and Mrs. Miller held his interest. (Ex. "T", Trans. 121.) Lasbury had not been paid for his interest (Trans. 71), and was contending in the Nebraska case that the sale to the Copper Company had actually been fully consummated, and the same was true of Mrs. Miller. (Trans. 25.)

The test of whether they had a right to eliminate the plaintiff's right to the West Brooklyn depended entirely upon the Copper Company exercising its right, under its option contract of purchase, by January 1, 1908, and that it did not exercise that right is perfectly plain as will be shown later, satisfying ourselves at this time by calling attention to the refusal of Miller to let the West Brooklyn go unless the Copper Company took with it the White Rock, and no less positive refusal of the Copper Company to take any but the West Brooklyn. In this connection it is well to suggest that the provision as to the sale of West Brooklyn, to the Copper Company, was merely to protect the Millers against the outstanding option and was not a sale to Millers. But for the outstanding option all differences could and would have been settled August 27, 1907, the date of the contract. The defendants are making the fight that the Copper Company should be making, if it cared for its option.

As proof conclusive that it cared nothing for it, the Copper Company took a lease for two years on the West Brooklyn. This also shows that the Millers were trying

to get for themselves this valuable claim, and only forwarded the deed to the Copper Company January 2nd, 1908, in sheer desperation—to defeat the plaintiff, hoping thereafter to make its lease good for the unexpired two years—a most valuable lease to them, as well as to the Copper Company. The Copper Company would give $10,000 for the West Brooklyn, but rather than give $20,000.00 for the two claims preferred the lease.

Millers would not let the West Brooklyn go for $10,000.00, but as they had a two year lease with the company, would prefer to make the plaintiff accept from them the properties tendered, after which the plaintiff would be out entirely and then the Millers would keep, for themselves, the West Brooklyn claim with the benefits under the lease. Nothing seems plainer.

This is still more clearly to be seen when we consider that, if the Company took the West Brooklyn, the Millers would have to pay more to the plaintiff and Lasbury than they would get from the Company if it paid $10,000.00. This is demonstrated as follows:

If the Millers put themselves in a position to deliver the West Brooklyn to the Copper Company it would have cost them more money, by several thousand dollars, than they were to get from the Copper Company. This is demonstrated by the following tabulation:

To be paid to plaintiff (Trans. 3)	$ 8,500.00
To Lasbury for his half interest in the West Brooklyn (Trans. 71), "I was to pay Lasbury $6,000.00 for this deed"	6,000.00
C. C. Miller's one-fourth interest in the West Brooklyn	2,500.00
Assessment work on other claims	100.00
Mrs. Miller's one-fourth interest in the West Brooklyn, deeded to her by A. G. Miller	2,500.00
Total	$19,600.00

In addition to this, his suit for $5,000, and the two years lease to the United Verde Copper Company, dated in September, 1907 (Trans. 78) were to be given up, as well as relinquishing all rights in five other mining claims. These two last items we do not consider of any importance since they never had any rights in those claims. But had the West Brooklyn been conveyed to plaintiff, defendants would have retained 175,000 shares of the Company stock, which, at 3 cents per share, was worth $5,250.00, agreed upon in the contract. Miller says that he received "good pay" from the Copper Company for the silica, showing that it was very valuable. (Trans. 97.) It may be claimed that Miller did not pay Lasbury $6,000.00. Be that as it may. Until January, 1908, he agreed to pay that much, but later in the year he and Lasbury made some kind of an arrangement, which we do not know, whereby the Millers paid Lasbury $3,090.00, Mrs. Miller paying $1,500.00 some time before June or July, 1908 (Trans. 72), as testified to by C. C. Miller (Trans. 71). On page 77 of the Transcript Miller says, in referring to what Lasbury was to receive:

"The contract stated that we were to pay him a certain sum of money for his interest in a certain number of mining claims and for some stock that he owned. We paid that. I don't know the date when we paid for a deed to the property; it was prior to the time I got the deed from the bank."

Further quoting from Miller's testimony (Trans. 71): "It was not necessary to take the deed from the bank before January 1, 1908, under the contract we had with Lasbury. I didn't pay the money before that time because I wanted to hold onto the money as long as I could. *I knew we had to pay it.*" The deed was taken from the bank April 30, 1908. (Ex. "H", Trans. 54, letter and receipt at bottom thereof.) A draft was paid to Lasbury, December 13, 1907, $1,590.00 (less $4 exchange)

(Ex. "F", Trans. 53), in response to a letter from Lasbury to the bank dated December 7, 1907 (Ex. "G", Trans. 53), making $3,090.00 that was actually paid Lasbury. Assuming that that was all that Lasbury received, that would make, instead of $19,600.00, in the neighborhood of $17,000.00 that the Millers were out in actual cash, and cash values, in order to sell the West Brooklyn claim for $10,000. It may be that the Millers intended to convey the West Brooklyn to the Copper Company. We think it is safe to say that men do not pursue others who have options on their property and who are not busying themselves to enforce the option, in order to get an opportunity to inflict themselves with such a loss, and in addition thereto resist as vigorously and as expensively as they have done in this litigation, to prevent the property from going to the rightful owner.

It is a very peculiar, if not suspicious, circumstance that Lasbury was to sell to the Millers at all, if they intended to carry out a sale to the Copper Company, because Lasbury was a party to the contract of August 27, 1907, and was bound by the terms thereof to convey this property to the plaintiff if no sale was made to the Copper Company, and if a sale was made to that Company he was bound by the conditional contract of sale of 1906 to convey to them.

We fail to see and understand how the defendants can urge a condition in the contract, made for their protection against the outstanding option held by the Copper Company, as between it and the Copper Company, when the Copper Company is making no claim by virtue of its option, but rather carrying out the terms of a lease between it and these same parties, which lease is inconsistent with the option.

As stated before, but for the claim of the Copper Company under its purchase option (two claims for $20,-

000.00), all differences could and would have been adjusted on August 27, 1907.

The Copper Company had never demanded the right to take the two claims for $20,000.00 under its option, but at most, manifested its willingness to take the West Brooklyn for $10,000.00 if all litigation were ended, and an abstract of clear title was given, which Miller refused to sanction. By what right, legal or equitable, can the Millers say it will be unconscionable to require of them that which they stood ready to grant but for Copper Company's option? The Millers had no right under the option to compel the Copper Company. It therefore lost nothing by the failure of the Copper Company to purchase.

It is strange reasoning that will allow the urging of third parties' acts or omissions as an excuse for not doing today what would have been done yesterday but for the existence of a third party, as between two parties with a positive contract.

The foregoing reasons omit any consideration of the expense and loss of time to which the Millers must inevitably subject themselves in making a defense which would inure to the benefit of no one but the Copper Company. If they sincerely were willing, voluntarily and without *demand* from the Copper Company, to deed to it for $10,000.00, after litigation, this very valuable claim and surrender that valuable lease, and to that end were also willing to pay to the plaintiff and Lasbury a much greater sum than they were to receive for the West Brooklyn, there was an exhibition of abnormally unselfish, concrete equity, over which they made themselves unsolicited guardians.

The record in this case affords scanty foundation for such tribute to these defendants.

Again, the defendants were not the owners of the West Brooklyn, nor could they ever become such, under the contract.

The provisions of the contract were such that either the Copper Company was to take the claim by January 1, 1908, or it failing to do so, the defendants were to deed it to plaintiff. Their claim to ownership is but another exhibition of inconsistent issues, and reasons in this manner: "We own it. We have sold it. You prevented our selling it. If we had sold it, the Copper Company would get it. If we have not, plaintiff gets it. The plaintiff having prevented our selling it, we get it, although we were not to have it under any contingencies."

(C.) THE UNDISPUTED TESTIMONY AND ADMISSIONS OF APPELLEES (DEFENDANTS) CONCLUSIVELY SHOW THAT THE FAILURE OF APPELLANT TO DISMISS THE SUIT MENTIONED IN THE CONTRACT SUED ON HAD ABSOLUTELY NOTHING TO DO WITH AND DID NOT CAUSE THE FAILURE OF APPELLEES TO PERFORM THE CONDITION PRECEDENT OF A SALE OF THE WEST BROOKLYN TO THE UNITED VERDE COPPER COMPANY.

Much that has been said in the preceding subdivisions is applicable here. That something other than the failure of the plaintiff to dismiss its suit prevented a consummation of the sale of the West Brooklyn to the Copper Company we think is clear. In addition to the reasons above stated, there was never an option for the sale of the West Brooklyn alone, for $10,000.00 or any other sum. There was an option on the White Rock and West Brooklyn together for $20,000.00, a single consideration for both. It was this conditional sale to which reference is made in the contract in suit.

That option was extended from time to time until January 1, 1908. It existed long before there was any litigation whatever between the parties to this and the

other suits. No one availed of it. The Copper Company would not avail itself of it at any time. The Millers would not deviate from its terms, until driven to the last hateful spectacle of having to witness the plaintiff enjoy its own. It was then that the deed to the two mentioned claims was sent to the Copper Company, January 2, 1908 (Trans. 92), without the solicitation or knowledge of the Copper Company. The deed was by the Copper Company rejected. It was on that date, that defendants dismissed their suit.

The complaint was filed on February 28, 1908, and the suit to be dismissed by the terms of the contract was actually dismissed February 15, 1908.

In addition to this, the defendants have never taken the position that a dismissal would have come too late had it been done on January 2, 1908. The dismissal by both parties of all suits were provided for in like terms, and the interpretation of the contract by defendants gave each of them at least until January 2, 1908, allowing the plaintiff the last minute of that day in which to dismiss. Thus construed there could be no intervening time for making a new sale.

On page 154 of Transcript, Folio 313, we find the following, from the Supreme Court:

> "The trial Court found, and we think properly, that the failure by appellant to dismiss the action indicated in the contract, prevented appellees from consummating a sale to the United Verde Company within the period allowed them by the contract."

In view of the undisputed evidence it is little short of marvelous how such a finding could be made. Necessity compels us to go into the evidence on this point.

First of all, we note in the Arizona Supreme Court's findings (Trans. 147, Folio 301):

> "In September, 1906, Miller and Lasbury gave an option to the United Verde Copper Company for the purchase of the West Brooklyn claim and the White Rock claim (which does not figure in this suit), for the sum of twenty thousand dollars. The term of this option does not definitely appear, but it was extended at different times and kept in force up to January 1st, 1908."

This finding is in keeping with many others. The whole contract of which the terms do not "definitely appear" is to be found in the Transcript, page 118, Plaintiff's Exhibit "O". This is the only contract ever entered into, and it was not for a sale of the "West Brooklyn" alone, but for *that claim and the "White Rock" together.* One of the defendants, Lasbury, says (Trans. 51, Folio 109), in speaking to Mr. Pearsall, president of the appellant Company:

> "Well, Charlie, you know very well we have another claim we are trying to sell to Mr. Clark. If we have to make this deal we must have the West Brooklyn to make that deal."

This is nowhere denied.

Defendant Miller also said (Trans. 105, Folio 218):

> "The West Brooklyn was never referred to as a single claim. When they bought, they bought both claims; when they pay for it they pay for both claims."

This shows, to begin with that defendants were using the "West Brooklyn" to sell an inferior claim, and that they were never making any effort to sell the "West Brooklyn" alone. In addition, the undisputed evidence

shows that the failure to sell was due to other reasons than appellant's failure to dismiss the said suit. Mr. Pearsall had a conversation with Mr. Lasbury December 27, 1907, which is undisputed (Trans. 49, Fol. 105), wherein Lasbury said:

> "Charley, that deal with the United Verde is entirely off. Senator Clark won't take the property because of the hard times, he don't want to incur any further expense. I have just come up to see whether you folks won't accept the stock alone and throw off the cash payment."

Again, Mrs. Miller, another of defendants, has never denied making the following statement (Trans. 50, Fol. 107):

> "We have come up to see if we can't make some different arrangements with you about this matter of ours. *Senator Clark is not going to take claim because of the hard times.* I think you hadn't ought to ask for this $3,000.00. I think you ought to be satisfied to take the stock and let that be enough. We can't raise that $3,000.00 unless we go to the bank and borrow it. That is not possible at this time."

("Senator Clark" referred to is and was the owner of the United Verde, and the Company is meant by using his name.)

Another statement that was never denied was that of defendant Lasbury, at the time he was still a record owner of the "West Brooklyn" (Trans. 75, Fol. 159):

> "That as to closing that deal it had fallen through owing to the fact of the panic and Senator Clark said he would not take the West Brooklyn on that account. Lasbury said they had up to a certain time to close the deal and could not make it owing to the fact that Senator Clark refused

to go on, on account of the hard times. I asked him how about his deal with Pearsall, and he said that their attorneys had made a flash on Pearsall's attorneys with the money, which of course did not go. He said that the deal they had with Pearsall was off, as he would not accept the money, and he said the reason Pearsall would not accept the money was because Senator Clark did not take the property. Lasbury said it was too bad, that everything was all right and would have went through if it had not been for a shortage of money. * * * He said that if the times got better he thought they might make the deal later on."

Mr. Pearsall had a conversation December 30, 1907 (Trans. 50, Fol. 106) with Mrs. Miller and Lasbury (Trans. 50, Fol. 107). Mr. Lasbury said:

"If we ever do make this sale we will give you a bond that will give you the same amount of money we are to give you now if the sale was made."

Mrs. Miller said:

"Because if we don't make this sale before the first of January we are in duty bound to make a deed to you for this property."

Mr. Lasbury said:

"Then we will have to dance to your music."

Mrs. Miller said:

"Lon left this to me and I am going to take the boys and go down there and settle down and try to make some income from it."

Mrs. Miller made this same statement to witness Collins (Trans. 76-77) in this language:

"Lon had left that for she and the boys for a living. She said that her son George was down there and that Charles was in the navy but he would

probably come back and go down there and assist in working the West Brooklyn claim."

Mrs. Miller said to Pearsall in presence of witness North (Trans. 78, top page):

"We have come to see if we can't make some different arrangements about the terms of this contract, or words to that effect. She said that the agreement with the United Verde Company was off; that there was no possible show of its being carried through, as Mr. Clark said that owing to the financial stringency the company could not raise the money."

Mrs. Miller further stated (Trans. 78, Fol. 166):

"If we do not agree to a different arrangement we will be in duty bound to deed this property over to you according to the terms of the contract."

Further in answer to what Mr. Pearsall said "that he had no notice that the sale of this claim to the United Verde was off," Mrs. Miller said:

"Well, you have my word for it, and my word ought to be good, and I will go before a judge or notary public and make oath that the sale is off."

Witness Ensor testified as to a conversation with Lasbury (Trans. 75, Fol. 160):

"I asked him if they had put up the amount of money called for in the contract, $8,500.00, and he said no, that they had made a flash with some money and stock, and I asked him if the contract called for an equivalent, and he said no, it called for $8,500.00," etc.

Further witness asked Lasbury:

"What are you going to do with the property now, George? And he said that Mrs. A. V. Miller said that she was either going to send her son George

down there, or had sent him down, to look after her interests and in that way they hoped that they would get something out of it."

Further (Trans. 76, near top of page) Ensor said:

"Lasbury said that Senator Clark said that on account of the panic he would not take the property."

There is nowhere in the record any denial of any of these statements, but there are places in the record affirming the same which we will not now take the time or trouble to quote.

The above admissions and statements are instructive in various ways and reveal the fact that the defendants, at all times, really avoided a sale to the United Verde, and tried, by the tender hereinbefore referred to, to purchase the "West Brooklyn" for themselves.

They wanted the claim on account of the lucrative silica contracts that they had made with the United Verde. Miller testified (Trans. 97, Fol. 206):

"The United Verde Copper Company entered into a written contract with me concerning this West Brooklyn claim, either in September or August, 1906; I think possibly I may have a copy of it at home. I think Norris & Ross have a copy of it. That is a copy of the contract to purchase. *It is the only contract I ever had with the United Verde Copper Company for the purchase of this West Brooklyn claim. It had something to do with the White Rock claim; just the White Rock and the West Brooklyn.*"

Mr. Clark testified (Trans. 109) that he was the assistant manager of the Copper Company; that the option to purchase the West Brooklyn, referred to, was considered by him as still in force on the 1st day of January, 1908. (Trans. 110.) That he received by mail a deed

"such as described" (the deed referred to was a deed conveying to the Copper Company both the White Rock and the West Brooklyn claims.) (Ex. "S", Trans. 121.) Continuing his answer (Trans. 110) witness said, in answers to defendant's counsel:

"A. * * * Do you want me to state concerning the White Rock claim?
Q. No, that is not concerned in this action.
A. That cuts some figure with our option.
* * *
Q. *If* no litigation had been pending affecting the title to the West Brooklyn mining claim, and the Miller brothers had been in a position to deliver a *clear marketable title* on the 2nd day of January, 1908, would the transaction have been closed at that time, *in your judgment*" (a clear conclusion) "*in so far as the West Brooklyn* claim is concerned? *I do not care anything about the White Rock.*
A. Yes, sir, it was *understood* we would take *it* and pay for *it.*" (A conclusion, but, understood by whom?)

On page 111 of Transcript Mr. Clark said (Fol. 229):

"Q. This option was not for the West Brooklyn, it was for the West Brooklyn and the White Rock, $20,000.00 for the two claims?
A. That was the original option.
Q. That was in writing?
A. Yes, sir.
Q. This subsequent option, what was that, verbal or in writing? There was no price stated on the White Rock claim or the West Brooklyn claim in this written option?
A. I think not.
Q. $20,000 for the two claims?
A. I think so.
Q. You never decided to purchase (either of) the two claims for $20,000?

A. No." (The words "either of" in ( ) is clearly error. Trans. 112, Fol. 231.)

"Q. What did you say to them with regard to the ownership resting in the Millers if they furnished you silica at a reduced price, if anything?

A. It was then also stated by me that *we would not take the two claims at* $20,000 but *would* take the one, West Brooklyn claim, or silica deposit at $10,000.00."

Referring to a conversation that Clark had with Mr. Job in March, 1908 (Trans. 112, first question), Mr. Clark testified as follows (Trans. 113, Fol. 232):

"Q. Up to that time you had not decided?

A. Not definitely decided, we were endeavoring to decide.

Q. The Millers wanted more than $10,000 for this claim?

A. No, sir.

Q. Are you sure of that, Mr. Clark?

A. I am sure of that because I had somehow learned the price stated in this other agreement; I had never seen it and did not see it stated *until this year. I had learned that the price stated was* $10,000 *and I stated that figure.*

Q. *But they had not consented to it, had they, at that time?*

A. *I do not think they immediately consented to it because when the first proposition was made I think it was only made to C. C. Miller and we would have to hear from others.*"

On page 114, 115, Transcript, Folio 235, speaking of the West Brooklyn claim, Mr. Clark testified:

"Q. The Millers have never asked you to pay them $10,000 for this claim, have they?

A. Oh, yes.

Q. When did they ask you that, Mr. Clark?

A. *Sometime this spring we considered this question.*

Q. *Subsequent to the 1st of January?*

A. *Yes.*

Q. *I mean prior to the 1st or 2nd of January this year" (1908)?*

"A. *No, prior to the first of January the transaction was left in the hands of the attorneys to close if the suit was dismissed.*

Q. Mr. Clark, you did not consider and you have never considered that your Company has exercised this option so that the Millers could sue you and make you pay $10,000 for that claim or any of the purchase price, is that not true?

A. I never considered any such contingency; *they have never demanded it.*

Q. *You do not consider today that the United Verde Copper Company owes the Millers $10,000 for this claim, do you?*

A. *No, sir."*

This testimony of Mr. Clark shows that never, until after the 2nd of January, 1908, did the Millers consent to take, or ask for, $10,000 for the one claim, *and that was after this suit was commenced.*

In this connection we want to lay stress upon the testimony of C. C. Miller (Trans. 105, top of page):

> *"There has never been a time since August 27, 1907, when we were able to tender the United Verde Copper Company a clear title unclouded by litigation, to the West Brooklyn claim.* The agreement of option which I speak of was extended several different times. And the extension of this option run up to and beyond the first day of January, 1908, or up to January 1st. If this litigation was ended *today* we *could* close the sale with the United Verde and not only that, *but I could have had* it two years ago if we could only have cleared the litigation. Mr. Pearsall is the only man that has kept us out of the money. It has always been ready for it. We could get it this evening if this litigation was ended. When I got the $2,000 from the United Verde Copper Company in December, it was to apply upon the purchase price of the *West*

Brooklyn and White Rock together. The West Brooklyn was never referred to as a single claim; when they paid for it they paid for both claims."

This statement as to $2,000 is denied by Mr. Clark, who says, "We would not take the two claims." (Trans. 112, Fol. 232.)

Taking this testimony in connecton with that of Mr. Clark it is clear that they were unable to agree on the West Brooklyn for $10,000 until in March, 1908, when the Millers were driven to take this position under the exigencies of this litigation. At all times prior thereto, to use his own language, "the West Brooklyn was never referred to as a single claim."

Now, taking Miller's statement that the two claims were always referred to as one, and "when they bought one they bought both claims; and when they pay for it they pay for both claims," in connection with Clark's statement, "it was then also stated by me that we would not take the two claims at $20,000 but would take the one, West Brooklyn or the silica deposit at $10,000," it is inconceivable how a finding can be sustained that the litigation referred to in the contract in suit prevented a consummation of the sale, since there was no meeting, at any time, of the minds of the parties seeking to make the sale for the West Brooklyn claim to the United Verde Copper Company—the proposing seller insisted that when they paid for one they paid for both, $20,000, and the contemplating purchaser insisted that they would not take the two claims at $20,000, but *would* take one at $10,000.

We are familiar with the rule that ordinarily this Court will accept the findings of the trial Court and reviewing state or territorial Court, but when, as in this case, the claim is made that there is no testimony in

the record, anywhere, justifying such findings as are held to defeat plaintiff's right to enforce, then this Court will review the evidence, to see whether or not there is any testimony to support the findings, and for fundamental errors.

Ward vs. Sherman, 192 U. S. 168.

It seems to us that both the trial and the Supreme Courts of Arizona gave an erroneous legal conclusion to the contract sued upon and that they then based findings of fact to support the erroneous legal conclusion upon the evidence. The contract, the pleadings, the findings of fact and the evidence, when all taken together, show erroneous legal conclusions. In order to arrive at a determination as to whether this is true or not, it becomes necessary to review the evidence in the light of the legal effect of the contract and pleadings, and whether or not in this light, there is evidence tending to support the findings. It would seem this Court will look into the evidence.

Southern Pine Lumber Co. vs. Ward, 208 U. S. 126.

We quote from the syl:

> "*Halsell vs. Renfrow*, 202 U. S. 287, followed, as to when this Court, in reviewing a judgment of the Supreme Court of the Territory of Oklahoma, is confined to determining *whether that Court erred in holding that there was evidence tending to support the findings made by the trial Court*, in a case submitted to it by stipulation, without a jury, and whether such findings sustain the judgment. In this case this Court holds that the Supreme Court of the Territory did not err *in finding that there was evidence to support the findings* made by the trial Court, and that those findings sustained the judgment."

At page 127 this Court seems to recognize that it

will examine the evidence to ascertain "if there is evidence tending to support the findings."

As to whether the Court was mistaken in holding that there was evidence tending to support the findings, and that such findings sustained the judgment, we quote from pages 137-138:

> "We come to the merits. *Before doing so it is necessary to fix accurately the scope of our inquiry.* The case was submitted to the trial Court by stipulation without a jury. That Court by virtue of the Code of Civil Procedure of Oklahoma was empowered to make findings of fact as the basis of its conclusions of law. Rev. Stat. 1903 (4477) Sec. 279. On the writ of error which was prosecuted to the Supreme Court of the Territory, that Court was confined to determining whether the findings of the Court below sustained the judgment, *if there was evidence supporting the findings,* and was not at liberty to consider the mere weight of the evidence on which the findings were made by the trial Court. Under these circumstances, notwithstanding the ruling in *Nat'l Live Stock Bank vs. First Nat'l Bank,* supra, pointing out the difference between the method of reviewing a case coming from the Territory of Oklahoma and cases coming from the territories generally, our review in the case before us is confined to determining whether the Court below erred; that is, *whether that Court was mistaken in holding that there was evidence* tending to support the findings and that such findings sustained the judgment. *Halsell vs. Renfrow,* 202 U. S. 287."

In September, 1907, Miller entered into a contract with the United Verde Copper Company for the furnishing of silica from the West Brooklyn and White Rock, for a term of two years. (Trans. 68.) That contract was in force when the trial Court in its judgment extended the time to perfect a sale to the United Verde Company.

Such a contract was wholly inconsistent with any thought of selling the West Brooklyn claim to the United Verde Company, and is entirely out of harmony with a disposition on the part of the United Verde Company to take the West Brooklyn for $10,000.. This lease or contract between the United Verde and the Millers, for silica, was a denial of the right of the United Verde to purchase. While the United Verde claimed to have this option, it contracted for a part of the ground—the earth, the silica, which is real estate until removed, for twenty-one months beyond the option. When the company made such a contract, it was estopped from denying that title would remain in the Millers for that length of time because title in the Millers was essential to fulfill their contract with the Verde Company, and it would seem that the Millers abandoned all desire to dispose of the West Brooklyn as early as September, 1907.

Somewhat analogous to this proposition is the case of Davis vs. Williams, 54 L. R. A., 749, from which we quote the second syl.:

> "One entitled to specific performance of a contract to convey land is precluded from maintaining a suit therefor by the fact that after obtaining the contract he took a lease of the property, since such suit involves a denial of the landlord's title."

This shows what these parties were doing, when they were dealing responsibly with each other, and such deliberate relations and status ought not to be disturbed by crippled expressions of conclusions as to what they might or might not do, if this or that was not done.

(D.) THE DEFENDANTS HAVING TAKEN THE POSITION, BEFORE LITIGATION WAS STARTED TO COMPEL PERFORMANCE, THAT THE WEST BROOKLYN HAD IN FACT BEEN SOLD TO THE UNITED VERDE COPPER COMPANY ON OR BEFORE JANUARY 1, 1908, CANNOT, AFTER SUIT, CHANGE FRONT AND ASSERT THAT A FAILURE TO SELL WAS FOR THE FAULT OF PLAINTIFF.

Having taken the position in the motion to require the plaintiff to dismiss its Arizona suit, on January 2, 1908, that the defendants had actually consummated the sale of the West Brooklyn to the Copper Company at that time, defendants could not, under settled rules of law, later, when litigation arose, be heard to assign other reasons, such as that plaintiff prevented consummation of the sale.

> "Two defenses irreconcilably inconsistent may not be enforced, and the position assumed by the party prior to the suit relative to the facts and circumstances involved in the transaction drawn into question will prevail."
>
> *Columbia Nat. Bank vs. German Nat. Bank* (Neb.), 77 N. W. 346, Syl. 6.

The Supreme Court of Arizona states in its findings (trans. 149, last par.): On January 2, 1908, "defendants filed in action No. 4541 their written motion to dismiss said action. *Consummation of the sale of .the West Brooklyn to .the United Verde Company was claimed.*" The answer filed by Lasbury and Mrs. Miller in Nebraska says: The sale of the West Brooklyn to the United Verde Copper Company "was duly consummated within the time therein specified" (meaning in the contract of August 27, 1907), "*and the property* therein mentioned duly and properly conveyed to said United Verde Copper Company." (Trans. 25, par. 3.)

Summarizing point 2: The only reason assigned by

the lower Courts for a denial of a decree of specific performance to plaintiff (appellant) was that said appellant had not dismissed prior to January 2, 1908, the suit against defendants, mentioned in the contract. We have shown that plaintiff's actions in this particular do not, under the terms of the contract, constitute a default warranting the Courts refusing the decree prayed for for the following reasons:

A. The formal dismissal of the said suit was not a condition precedent to the sale of the Brooklyn claim to the United Verde.

B. Defendants (appellees) made no tender of performance, showing a sale to the United Verde, but at most claimed consummation.

C. The uncontroverted evidence conclusively shows that the failure of appellants to dismiss the said suit had absolutely nothing to do with appellees' failure to consummate a sale with the United Verde Company, and that fundamental errors have been committed, to the great injustice of plaintiff's rights.

POINT 3.—NEBRASKA DECREE.

The Court erred in refusing to give effect to the Nebraska decree, for the reason that it constituted an adjudication of the rights of the plaintiff and certain of the parties defendant by a Court of competent jurisdiction, and was therefore conclusive in this case as to such rights and parties as were involved therein.

(Assignments of Error 6, 7, 8, 9, and 10.)

The Supreme Court of Arizona summarily disposes of the Nebraska judgment as follows(Trans. 133, last paragraph):

"The appellant groups the assignments of error 6, 7, and 19, and under them argues that the trial court erred in not giving force and effect to the judgment of the Nebraska Court. The effect of the Nebraska decree presents an interesting question. The decision of the United States Supreme Court in *Falls vs. Eastin*, 215 U. S. 1, would indicate that the ruling of the lower court on that subject was correct, but this question was only raised in this case by the reply of the appellant to the cross-complaint of the appellees, and as the lower court gave no relief to appellees on such cross-complaint and dismissed the action for specific performance on other grounds, that feature of the case was never reached. We do not think that the point here attempted to be made will avail the appellant for the reason that the continuance in December, 1908, was granted to the appellant on the stipulation that if the case were continued, no judgment that might be secured in Douglas County, Nebraska, should be pleaded in this case. This estops the appellant from pleading the Nebraska judgment, and sustains the court's ruling that it was 'not entitled to recover anything herein under, by virtue or by reason of such re-cree. The appellant does not contend that the commissioner's deed is valid or of any effect in this jurisdiction."

The "Assignments of Error 6, 7 and 19" referred to by the Court of Arizona are the Assignments presented in appellant's brief in that Court; that being the practice therein, and in order that the Court may be fully advised as to the same they were:

Assignment VI.

"The decree and judgment of the Court is contrary to, and in violation of Article 4, Section 1, of the Constitution of the United States in that said decree and judgment ignores said section

requiring each state and territory of the United States to give full fath and credit to the judicial proceedings of every other state, in that the Court refused and failed to give faith and credit to the judgment set up in the reply to the plaintiff, which said judgment was rendered in the District Court of the State of Nebraska within and for the Fourth Judicial District of the State of Nebraska, in Douglas County thereof, although said judgment was considered by the Court and denied any force or effect, said judgment of said District Court of the State of Nebraska having been pleaded by the plaintiff and asserted in this action against the claim of defendants, George B. Lasbury and Ada M. Miller, and those defendants holding conveyances by, through or under them or either of them.

Assignment VII.

There was an error on the part of the Trial Court in that the judgment of the Nebraska Court set up in the plaintiff's reply necessarily inhered in the decision and judgment of the Court and without considering said judgment of the Nebraska Court, the Court could not enter the judgment in the instant case; and in that the consideration, and effect to be given to the Nebraska judgment aforesaid was and is necessarily involved in the consideration and determinaton of the instant case, and the Court erred in not giving faith and credit to said judgment of the Nebraska Court, as required by said Section 1 of Article 4 of the Constitution of the United States.

Assignment XIX.

The Court erred in not giving force and effect to the Special Commissioner's deed executed by order of the District Court of Douglas County, Nebraska, conveying by its terms to the plaintiff herein all the interest and title in and to said mining claims in suit which defendants, George B. Lasbury and Ada M. Miller, had or claimed

in and to said mining claims or any of them, in accordance with the decree of the District Court of Douglas County, Nebraska, which said Commissioner's deed and decree of said District Court of Nebraska were pleaded and set out by the plaintiff in its reply upon which this case was tried; that in doing so the trial court denied to the judgment and decree of the District Court of Douglas County, Nebraska, that faith and credit to which the same was entitled under and by virtue of the provisions of the Constitution of the United States, being Article 4, Section 1 thereof."

The above extract from the decision of the Arizona Supreme Court was erroneous for the reasons set out below and is covered by assignments of error 6, 7, 8, 9, and 10. Assignment 8 is misprinted, Trans, 144, and should read as follows (Original Trans. 294):

"It was error for the court to hold that the making of such stipulation estopped appellant from pleading the Nebraska judgment, for the reason that the same was made with reference to the state of the pleadings at the time."

Lasbury and Mrs. Miller were citizens of Nebraska when the Nebraska suit was commenced and as late as June or July, 1908, when Mrs. Miller went to Arizona. The Nebraska Court acquired jurisdiction over both of them by personal service the day the petition was filed. (For the Nebraska judgment, see 27-28, Transcript). That was an action for specific enforcement of the same contract as in the Arizona suit. Being predicated upon a contract, the cause of action was transitory and *in personam*, not *in rem*. At the time that suit was commenced, as well as at the time the Arizona suit was commenced, no Court had jurisdiction of all of the parties to the contract, and specific enforcement could not have

been decreed by either Court as to all the parties. Defendants, Lasbury and Mrs. Miller, were fully heard. The Nebraska Court decreed, as against them, in favor of the plaintiff to the effect that the plaintiff was entitled to specific enforcement of the contract. Trans. 27-29). Those defendants, then, were the paper owners of an undivided three-fourths interest in the West Brooklyn. The decree was entered February 8, 1909, and prior to the trial of the case in Arizona and bound Lasbury and Mrs. Miller, and their privies who took under them with notice.

> "But a judgment not only estops those who were actual parties but also such persons as were represented by those who were or claim under or in privity wth them."
>
> *Bigelow vs. Old Dominion Copper Mining & Smelting Co.*, —U .S. —, Nos. 191 and 192, Oct. Term, 1911, (May 27, 1912, pp. 3-4).

Title was in Lasbury when he signed the contract in suit, and when the Nebraska suit was instituted and service had upon him. Alonzo V. Miller's interest had been conveyed to Mrs. Miller. The Supreme Court of Arizona has settled the jurisdiction of the Nebraska Court over Mrs. Miller and Lasbury.

Butterfield vs. Nogales Copper Co., 80 Pac. 345.

We quote from that case as follows:

> "It is settled doctrine that a court of equity, having acquired jurisdiction over the person of the defendant, has jurisdiction to enter any decree which may concern or affect lands situated in a foreign state to the same extent and as fully as though these were situated within the state where the court has its situs."

One of the examples given in that opinion was spe-

cific performance affecting lands in a foreign jurisdiction. That the Nebraska judgment was binding upon the parties and their privies, as to interests in the subject matter while the suit was pending, is borne out by the following authority:

Heinze vs. Butte Mine Co. (9 C. C. A.), 129 Fed. 274, 285-6.

In addition to the fact that C. C. Miller was in privity with Lasbury he had actual knowledge of the pendency of the Nebraska suit before he acquired the deed from Lasbury. (Trans. 71-72). All facts in issue and determined, are foreclosed by the judgment of the Court, and cannot be disputed in subsequent litigation between the same parties, or their privies.

The J. R. Langdon (6 C. C. A.), 163 Fed. 472, 475-479.

Bigelow vs. Old Dom. Co., Nos. 191 and 192, above.

In the J. R. Langdon case, the point directly in issue was whether or not a lien existed against a steamboat. It was not a suit to enforce a lien. The lien was asserted by one party and denied by the other. The Court determined that a lien existed. One contention was that a maritime lien could not be enforced except in Maritime Courts, hence the Circuit Court of the United States had no jurisdiction to declare a lien. The Federal Court ruled that it had no power to *enforce* the lien, yet it had a right to *determine* whether or not a lien *existed*, apart from its enforcement, and, having once determined it, that conclusion was binding upon the maritime court in a suit to enforce the lien. In further suport of the doctrine, we cite:

Estil vs. Embry (6 C. C. A.), 112 Fed. 882.

So. Pac. Ry. Co. vs. U. S., 168 U. S. 1, 48.

Niles vs. Lee (Mich.), 135 N. W. 274, 277, Col. 2.

The Trial Court should have given full faith and

credit to the Nebraska judgment under the provisions of Article 4, Section 1, of the Constitution of the United States.

The main fact in issue in the Nebraska Court was whether or not the plaintiff was entitled to specific enforcement of the contract in suit, and, therefore, the equitable owner of the property. Incident to that fact, the Court determined rightfully whether or not there had been a consummation of the sale to the United Verde Company, and whether or not the defendants, Lasbury and Mrs. Miller, had performed the conditions required of them, which were precedent. All of these questions rest on the personal obligations of the parties, were presented by the pleadings, and fully litigated and resolved against the defendants. The remaining question is: Are the defendants bound by that decree when seeking to relitigate the same question in courts outside of the State of Nebraska, but within the United States? If the Nebraska Court had power to inquire into these facts and establish them, it had power to establish them forever. Not only are the facts actually litigated established, but the parties are precluded from litigating any question which should have been put in issue by them in order to defeat the action for specific enforcement, which would include the question of plaintiff's misconduct tending to prevent a consummation of the sale to the United Verde Company.

From *So. Pac. Ry. Co. vs. U. S.*, 168 U. S., 1, we quote Syl.:

> "A right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action."

At page 48, near the bottom, and continuing on page 49:

> "The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunes would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

Under the rules of pleading in Arizona, all matters are denied which are not admitted, and new matter in an answer or cross-petition stands denied without a reply. Under the equity Federal practice, rule 45, a replication is not required unless the answer necessitates an amendment to the bill. The answer in this case is a resistance of plaintiff's cause of action with a cross-complaint asserting ownership of the West Brooklyn, by, and asking to quiet title of, defendants, by setting up ownership in the cross-complaint. The Nebraska decree became competent evidence without further pleadings, regardless of any stipulation which had been entered into prior to the

filing of the answer upon which the trial proceeded, for the reason that it rebutted facts upon which the defendant materially relied to establish their ownership in the West Brooklyn.

At page 57, *So. Pac. Ry. Co. vs. U. S.*, 168 U. S. 1, it was ruled that a former decree, which established maps identifying granted lands, was competent *as evidence, without pleadings.*

In another case than the one in which the decree was established which was offered in evidence, the So. Pac. Ry. Co. denied the identity of the lands established by the said maps. The Court said, 57:

> "But that precise issue we have seen was made in the former suit, and was determined for the United States. And to establish that fact the United States introduced the former record as evidence in its behalf. To say that the Government lost the benefit of its former judgment, covering this issue or question, because it did not amend its bill and plead the judgment as an estoppel, is to say that it was required to set out in its petition what was merely evidence to support its title to the land in controversy."

We need not discuss the effect of the stipulation to not plead the Nebraska decree, had affirmative relief not been asked. Had affirmative relief not been asked by defendants, we could have dismissed Ada M. Miller and Lasbury out of the Arizona suit without affecting plaintiff's rights.

Substantially, a new action was brought by the defendants to quiet title. In such an action it would scarcely be disputed that the Nebraska judgment would be competent and proper evidence. It, being a new action in effect, was not within the contemplation of the parties, nor the Court, when the stipulation for continuance was made.

In the Southern Pacific case, the railway company undertook to re-litigate the question of the maps and the identity of the land. The court said, bottom of page 58:

> "The manifest purpose of it was to relieve the strain of the prior decision, and, under the guise of presenting new issues of a substantial character to enable the railroad company, by introducing additional evidence on its behalf, to retry, in this collateral proceeding, the question as to the sufficiency of the maps of 1872."

Page 59, last paragraph:

> "That the record and judgment in the former cases were admissible in evidence, *without being specially pleaded*, we entertain no doubt. *And when before the court as admissible evidence, the only inquiry was whether* the *sufficiency* of the *maps* of 1872 was a *matter in issue* and *determined between the parties* to those cases. There are some cases holding that a judgment, without being specially pleaded, is not conclusive upon the issue to which it relates, but it is only persuasive evidence, and that the Court is at liberty to find according to the truth as shown by all the evidence before it. But according to the weight of authority and upon principle, *the former judgment, if admissible in evidence at all, is conclusive of the matters put in issue and actually determined by it.* Mr. Greenleaf correctly says that 'the weight of authority, at least in the United States, is believed to be in favor of the position that *where a former recovery is given in evidence, it is equally conclusive, in its effect, as if it were specially pleaded by the way of estoppel.*'"

In that case the railroad company urged upon the Court that its evidence was so overwhelming as to compel the Court, in the interest of truth and justice, to dis-

regard the former decree. Speaking to that question, at page 65, the Court said:

> "Whatever is new in the evidence now before us, touching that matter, is simply cumulative on the one side or the other. The application to consider that evidence is practically an application for a rehearing as to things directly determined in the former suits between the same parties, and which adjudication has never been modified. Such a course of procedure is wholly inadmissible under the settled rule of *res judicata*. Without, therefore, expressing any opinion as to the effect of this new evidence relating to matters once finally adjudged, *we hold that the Southern Pacific Railroad cannot, in this proceeding, question the validity of those maps, as maps of definite location.*"

This case has been approved:

Deposit Bank vs. Frankfort, 191 U. S. 499-514.

Fayerweather vs. Ritch, 195 U. S. 276, 301.

Northern Pac. Co. vs. Slaght, 205 U. S. 122, 131.

"A judgment between two citizens or residents of the country, and thereby subject to the jurisdiction in which it is rendered, may be held conclusive as between them everywhere," even though they may be citizens of a foreign nation; and the judgment rendered in a foreign land, without the aid of the constitutional provision maintains between states and territories of this nation.

Hilton vs. Guyot, 159 U. S. 113, 170.

The constitution has made imperative, between the states, that which rested in comity between nations.

A judgment in a State Court having jurisdiction to render that judgment, is as valid in a foreign jurisdiction as in the domestic.

Harris vs. Balk, 198 U. S. 215.

In that case, the Maryland Court rendered judgment

against a North Carolina citizen who was temporarily sojourning in Maryland. Upon his return to North Carolina he was sued upon that judgment, and the North Carolina Court refused to recognize the Maryland judgment. That case was taken to the Supreme Court of the United States, and it said at page 221:

> "If the Marlyland Court had jurisdiction to award it, the judgment is valid and entitled to the same full faith and credit in North Carolina that it has in Maryland as a valid domestic judgment."

If the answer and cross-petition presented new issues calling for litigation of the questions ruled in the Nebraska decree, and it was proper, in meeting such new issues, to plead the Nebraska decree as soon as defendants made new issues, the stipulation could not estop plaintiff in its rights so made and created by defendants, voluntarily and of their own motion.

Once properly pleaded, proof thereof was in order.

Until the proofs were all before the court no one could see to the end of the trial, including what the trial court would ultimately say, and determine what the pleadings should be, by that method. If proper to present a proper issue, at the time it was offered, testimony properly received under it is firmly lodged in the record and should be considered for what it will prove.

No matter what view the Court finally takes of the claims of defendants, the evidence remains in the case with all its probative force.

If such evidence properly gets into the record, no matter how, whether based upon some affirmative allegation in a pleading or by reason of independent rules of law applicable to its admission, and that evidence is made a verity by the Constitution, courts will not be heard to say that full faith shall not be given a judgment of a

sister state merely because not pleaded. There is a pronounced difference between *pleading* a given truth and *proving* it.

The provisions of the decree by the trial court were: If within ninety (90) days from the date thereof, defendants shall consummate or make *a binding contract* for the sale of the West Brooklyn to the United Verde Copper Company, and pay over, or tender to plaintiff the money, stocks, deed and proof of assessment work, as provided in the contract of August 27, 1907, then the decree will forthwith become final, irrevocable, and non-appealable, and plaintiff shall be *forever barred and estopped* to claim any *right*, title or interest in or to the West Brooklyn Mining Claim; thus, in effect, and directly, giving defendants affirmative relief based upon their amended answer and cross-petition as prayed for therein. But for such amended answer the Court could not have decreed that the plaintiff did not have or could not thereafter have any right, title or interest in and to that claim, and could not adjudicate that the plaintiff be forever barred and estopped to claim any interest therein.

In this connection we want to call the attention of the Court to the language of the Supreme Court of Arizona in dealing with this question. (Trans. 133-4, near bottom page):

> "The effect of the Nebraska decree presents an interesting question. The decision of the United States Supreme Court in *Fall vs. Eastin*, 251 U. S. 1, would indicate that the ruling of the lower court on that subject is correct, but this question was only raised in this case by the reply of the appellant to the cross-complaint of the appellees, *and as the lower court gave no relief to appellees on such cross-complaint* and dismissed the action for specific performance on other grounds, that feature of the case was never reached."

The Supreme Court of Arizona evidently overlooked this affirmative relief granted by the decree of the trial court, and is mistaken, we think, when it says that "the lower court gave no relief to appellees on such cross-complaint."

In order to see that the Court was mistaken, we invite attention to the second and third paragraphs of the cross-complaint (Trans. 14), as follows:

> Paragraph 2. "That cross-complainants above named are the owners, entitled to the possession and in the possession of that certain mining claim situated in the Big Bug Mining District of Yavapai County, Arizona, and described as follows: 'West Brooklyn,' notice of location whereof is of record in book 67 of Mines, page 408, records of Yavapai County, Arizona."
>
> Paragraph 3. "That cross-complainants herein are credibly informed and believe that plaintiff, Brooklyn Mining & Milling Company, makes some claims to said mining claim adverse to these cross-complainants. Wherefore cross-complainants pray judgment as follows: (1) That cross-complainants' estate in said mining claim be established. (2) That said Brooklyn Mining & Milling Company, a corporation, be forever barred and estopped from having or claiming any right or title to said premises adverse to said cross-complainants."

The exact language of the decree is: "Plaintiff shall be forever barred and estopped to claim any right, title or interest in or to said 'West Brooklyn' Mining claim." (Tr. 41, par. 3).

This provision of the decree goes beyond adjudicating affirmative relief in behalf of defendants, by penalizing the plaintiff (trans. 40, second paragraph of decree), "if plaintiff shall fail or refuse to file herein within said period of 30 days from the date hereof its written con-

sent and waiver," etc., by dismissng the suit presented by its complaint, in addition to destroying its claim in and to the West Brooklyn regardless of the sale, to say nothing of attempting to deprive the plaintiff of its constitutional right to appeal, thus putting the plaintiff, in the language of Mr. Justice Holmes *(Stoffela vs. Nugent,* 217 U. S. 499, 501), in the position of becoming "an outlaw and *caput lupinum.*"

The Supreme Court further said (trans. 134) in speaking of the Nebraska decree: "That feature of the case was never reached." We think this is a misconception of the decree. The trial court reached far enough into the issues presented by the cross-complaint to decree that the plaintiff could not have and hold an interest in the land in the future, unless it saw fit to file the written consent imposed, thus ignoring utterly the Nebraska decree, which showed that the plaintiff did have at least a three-fourths interest in the West Brooklyn claim. And the constitution says it shall not be ignored where it is a necessary question involved, because it shall receive full faith and credit. Giving to the Nebraska decree full faith and credit would entirely prevent the adjudication to the effect that "plaintiff shall be forever barred and estopped to claim any right, title or interest in or to said West Brooklyn Mining claim."

It is true that in the opinion of the Supreme Court and its final action in this case it said (Trans. 134, Fol. 274):

> "For the full protection of the appellant from any prejudicial effect of any portion of the decree, other than that of dismissal, the judgment of this Court is that the judgment and decree of the lower Court be modified to read, 'It is ordered, adjudged and decreed that plaintiff's action shall stand dismissed and plaintiff shall take nothing thereby," etc.

This, in effect, was the withdrawal by the Supreme Court of the allegations and prayer in the cross-complaint; elimination of the Nebraska decree as evidence, by withdrawing that issue, and materially emasculating the pleadings and proofs. It trimmed down the pleadings, the evidence and the decree of the trial Court. No matter what the means may have been of refusing consideration of the Nebraska decree, the effect is the same, —it has not been given faith and credit, because if it had been the Court would have been necessarily compelled to find, the Nebraska judgment being properly in evidence, that the plaintiff was in fact entitled to specific performance of the contract as against the Nebraska defendants and therefore was entitled to a like performance against the Arizona defendants, in so far as they were in privity with the Nebraska defendants.

The pleadings, as filed, present on the side of the plaintiff, allegations and prayer which it claims entitles it to specific performance—affirmative relief; on the side of the defendants, a resistance of that claim, and allegations and prayer which they claim entitle them to have the Court dismiss the plaintiff's complaint, and after that is done, grant defendants a decree adjudging them to be the owners of the property and forever barring plaintiff from claiming any interest therein, also affirmative relief.

It cannot be denied that these issues were before the Court and the Court could not, of its own motion, strike out from the pleadings any such issues, simply because it did not care to try them. This being true, it became the duty of the Court to dispose of these issues. The trial Court took that view and disposed of those issues by adjudging: (1) That the plaintiff's complaint be dismissed, (2) having dismissed the plaintiff's complaint, that the defendants be freed from any interference by plaintiff by reason of any claim to the property which the plain-

tiff might theretofore have asserted,thus disposing of the issues presented by the defendants. Had the case ended there, every issue presented would have been cared for. It did not end there. An appeal was taken to the Supreme Court of Arizona, which Court, in disposing of the Nebraska decree, dismissed the complaint, leaving suspended the cross-complaint and the issues thereby presented. Nowhere does the Arizona Supreme Court, in its decree, respond to all the issues presented, and, so far as we know, the cross-complaint is still pending somewhere—we don't know where—because the Arizona Supreme Court did not remand the case to the lower Court and did not reserve the right, in itself, to later dispose of it. The plaintiff certainly has a right, as against it, to have the suit represented by the cross-complaint disposed of.

CONCLUSION.

We think the decree of the lower Court ought not to stand; that owing to the nature of the case, the state of the pleadings and the uncontroverted evidence, it should be set aside, and that this is a case for this Court to order a reversal, with directions to the lower Court to enter judgment for plaintiff. This we pray.

Respectfully submitted,

JOHN J. HAWKINS,
Attorney for Appellant.

THOS. C. JOB,
A. W. JEFFERIS,
F. S. HOWELL,
Of Counsel.

APPELLEE'S

BRIEF

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

BROOKLYN MINING AND MILLING COMPANY,
Appellant,
vs.
CHARLES C. MILLER, et al.,
Appellees.
No. 144.

Appeal from the Supreme Court of the Territory of Arizona.

BRIEF ON BEHALF OF APPELLEES.

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Attorney for Appellees.

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SUBJECT INDEX.

ALPHABETICAL LIST OF CASES REFERRED TO.

STATEMENT.

We adopt as our statement of the case the findings in the nature of a special verdict made by the Supreme Court of the Territory of Arizona, signed by Chief Justice Kent.

Prior to December, 1906, the appellant, Brooklyn Mining and Milling Company, a corporation, was the owner of the Brooklyn mining claim in Yavapai County, Arizona. Charles W. Pearsall was then and at all times since has been a stockholder of that corporation, and ever since January, 1907, has been president thereof. Alonzo V. Miller, George B. Lasbury, and Charles C. Miller were also stockholders in said company, and prior to December, 1906, had located in their own name, together with one Thomas H. Ensor as co-locator three mining claims adjoining the Brooklyn claim, known as the West Brooklyn, the East Brooklyn and the South Brooklyn claims. In August, 1906, Lasbury acquired Ensor's interest in the three claims by deed recorded September 18th, 1906, after which date Alonzo V. Miller, George B. Lasbury and Charles C. Miller were the record owners of said claims. In September, 1906, Miller and Lasbury gave an option to the United Verde Copper Company for the purchase of the West Brooklyn claim and the White Rock claim (which does not figure in this suit), for the sum of twenty thousand dollars. The term of this option does not definitely appear, but it was extended at different times and kept in force up to January 1st, 1908.

In December, 1906, Pearsall, in behalf of himself and other stockholders instituted a suit (No. 4541)

in the District Court of Yavapai County against the Millers and Lasbury for the purpose of having it declared that the Millers and Lasbury held the title to the West, East and South Brooklyn claims in trust for the Brooklyn Company, and to require them to convey said claims to the company. An amended complaint was filed on July 7th, 1907, in this action naming the Brooklyn Mining Company as plaintiff. In May, 1907, Charles C. Miller brought suit against the Brooklyn Company for five thousand dollars claimed to be due him for work done upon the Brooklyn claim. While both suits were yet pending a compromise agreement was made between the parties on August 27th, 1907, as follows:

"Whereas, an action is now pending in the District Court of Yavapai County, Arizona, entitled Brooklyn Mining & Milling Company et al. vs. Charles C. Miller, Alonzo V. Miller and George B. Lasbury, which action relates to the title of the West Brooklyn, East Brooklyn and South Brooklyn Mining Claims located in said County and Territory, and relates to an accounting for ores and minerals taken therefrom, and

"Whereas, The said Charles C. Miller, Alonzo V. Miller and George B. Lasbury have made a conditional sale of the above named West Brooklyn Mining claim for the sum of ten thousand dollars to the United Verde Copper Company, and

"Whereas, an action is pending in the District Court of Yavapai County, Arizona, entitled Charles C. Miller v. Brooklyn Mining & Milling Company for several thousand dollars claimed to be due and

owing to the said Charles C. Miller for services performed by him and Alonzo V. Miller for the said Brooklyn Mining & Milling Company, and

"Whereas, It is the desire of the parties connected with the foregoing causes of action to settle the same, and to adjust the matters of difference between the parties in connection therewith;

"Therefore, In consideration of the dismissal and settlement of the foregoing causes of action it is hereby stipulated and agreed by and between the Brooklyn Mining & Milling Company and Charles C. Miller, Alonzo V. Miller and George B. Lasbury that if the sale of the West Brooklyn Mining claim to the United Verde Copper Company is consummated on or before the first day of January, 1908, the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to transfer and deliver to the said Brooklyn Mining & Milling Company one hundred and seventey-five thousand shares (175,000) of stock in said Brooklyn Mining & Milling Company, free and clear of all liens and incumbrances whatsoever; it being understood that said transfer of stock is to include all of the holdings of said Charles C. Miller, Alonzo V. Miller and George B. Lasbury in the Brooklyn Mining & Milling Company, and the said parties are to receive therefor the sum of 3 (Three) cents per share for said stock; and in addition thereto Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to pay to the Brooklyn Mining & Milling Company the sum of eight thousand, five hundred dollars ($8,500.00) out of the proceeds derived from the sale of the said West Brooklyn mining claim; in addition thereto

the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to convey all of their right, title and interest in and to the East Brooklyn, South Brooklyn, North Brooklyn, Empress and Midway mining claims, and said transfer shall contain the warranty that the assessment work has been done for the year 1907 upon the Empress, Midway and North Brooklyn, and the said Brooklyn Mining & Milling Company shall pay the said assessment work at its reasonable value. The said Charles C. Miller, Alonzo V. Miller and George B. Lasbury agree to do the assessment work for the year 1907, on the East and South Brooklyn mining claims, and said assessment work so to be performed is to be paid by the Brooklyn Mining & Milling Company at its reasonable value. It is further stipulated and agreed by and between the parties hereto that if for any reason the sale of the West Brooklyn claim to the United Verde Copper Company by the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury shall not be consummated on or before the first day of January, 1908, then the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to convey to the Brooklyn Mining & Milling Company all of their right, title and interest in and to the West Brooklyn, East Brooklyn, South Brooklyn, North Brooklyn, Empress and Midway mining claims, and the assessment work on the North Brooklyn, Empress and Midway claims for the year 1907 is to be paid by the said Brooklyn Mining Company at its fair and reasonable value.

It is understood by and between the parties hereto that the foregoing does not concede or admit any of the allegations contained in the pleadings of said

causes of action, but the agreement is entered into for the purpose of adjusting the matters of difference between said parties and avoiding further costs and expenses to the parties hereto.

IN WITNESS WHEREOF, We have hereunto set our hands this 27th day of August, A. D., 1907.

C. C. MILLER
A. V. MILLER
G. B. LASBURY
BROOKLYN MINING & MILLING COMPANY
By Chas. W. Pearsall, President."

On December 17th, 1907, Alonzo V. Miller executed, acknowledged and delivered to Ada M. Miller a deed, conveying to her his interest in the West Brooklyn claim. On December 18th, 1907, Alonzo V. Miller died, leaving a widow, Ada A. Miller, and two sons, viz: Charles C. Miller No. 2, and George M. Miller, a minor.

In December, 1907, counsel for Lasbury and the Millers requested a dismissal of action No. 4541 and directed a dismissal of No. 4608 (the case of Miller v. the Company). Counsel for the company declined to dismiss the case against the Millers, and the formal dismissal of the Miller case was not entered of record until January 2nd, 1908.

On January 2, 1908, the case of Miller against the Brooklyn Company, No. 4608, was dismissed. On the same date defendants filed in action No. 4541 their written motion to dismiss said action. Consummation of the sale of the West Brooklyn to the United Verde Company was claimed, and a tender of performance of the obligation of the Millers

and Lasbury, under the agreement of Auguts 27, 1907, was made. This tender was refused by counsel for the appellant on the ground that it did not fully comply with the terms of the agreement, and counsel again declined to dismiss the suit, No. 4541.

On January 28, 1908, the Brooklyn Company brought suit in the District Court of Douglas County, Nebraska, against Charles C. Miller, George B. Lasbury and the survivors of Alonzo V. Miller, viz: Ada M. Miller, Charles C. Miller No. 2 and George M. Miller, a minor, for the specific performance of the agreement of August 27, 1907, and George B. Lasbury and Ada M. Miller were personally served with process in Nebraska.

On February 11, 1908, the Brooklyn Company filed a supplemental complaint in case No. 4541, in which it set up the contract of August 27, 1907, and asked for specific performance thereof, by requiring defendants to convey the West Brooklyn claim, and others, to plaintiff.

On February 15, 1908, the Brooklyn Company dismissed action No. 4541 involving the title to the West Brooklyn claim, being the action, the dismissal of which was stipulated in the agreement of August 27, 1907, and on the same date, immediately thereafter, filed another action No. 4923, for specific performance of the contract of August 27, 1907, wherein the company claimed ownership of the West Brooklyn by virtue of the contract of August 27, 1907, and asked that defendants be required to convey the same to the Company, and that the Company's title therein be quieted.

On February 18, at 9 o'clock A. M., the Brooklyn

Company dismissed action No. 4923, and on that date at 9:10 A. M., filed the case at bar, No. 4927.

The actions numbered 4541, in which a lis pendens was filed, and 4923 and 4927, and the suit brought in Nebraska on January 28, 1908, all involved the title to the West Brooklyn claim, and in all of said actions the Brooklyn Company sought a specific performance of the contract of August 27, 1907. In action 4541 specific performance was asked by the supplemental petition above mentioned.

On December 23, 1908, the case at bar came on for trial in Yavapai County, and the plaintiff asked for a continuance. This was contested by the defendants, and the pendency of the action in Nebraska urged by them as ground for a trial at that time. It was then stipulated that if the case was continued no judgment which might be secured in Douglas County, Nebraska, should be pleaded in this action. "That counsel for appellant thereupon stated in effect, that they would agree if said cause were continued that no judgment which might be secured in the District Court of Douglas County, Nebraska, in an action then pending between the same parties should be pleaded in this action, whereupon the following colloquy took place:

By Mr. Norris (counsel for appellees): It is stipulated that no judgment in the Omaha court will be pleaded in this court, and it is admitted that it can have no effect on the trial of the proceedings in this court.

By Mr. Job (counsel for appellant): That is going beyond my province, as to what effect it will have.

By Mr. Norris: I assert it, and our correspondence clearly shows that.

By Mr. Ross (counsel for appellees): That is sufficient, that will not be pleaded.

By the Court: Yes, if it is not pleaded it will not amount to anything."

Thereupon, the continuance was granted on the motion and at the cost of the Brooklyn Mining & Milling Company, plaintiff.

On February 8, 1909, the Nebraska case was decided in favor of the company. The Nebraska court held that the sale of the West Brooklyn had not been consummated as provided for in the agreement of August 27, 1907, and decreed that George B. Lasbury and Ada M. Miller specifically perform the obligations devolving upon them under the compromise agreement by reason of the non-consummation of the said sale, and decree that George B. Lasbury and Ada Miller convey to the Brooklyn Company all their right, title and interest in the West Brooklyn claim and the five other claims named in the compromise agreement, and in default of their doing so a master be appointed by the court to make such conveyance. No parties to the Nebraska suit were served with process or appeared except Ada M. Miller and Lasbury. The master appointed by the court thereafter executed and delivered a conveyance of the claims mentioned to the Brooklyn Company.

On March 25, 1909, the case at bar came on for trial in the District Court of Yavapai County, and

on April 24, 1909, judgment was rendered therein. Immediately prior to the trial of the case, and on March 23, 1909, the plaintiff filed a reply to the amended answer and cross-complaint (which amended answer and cross-complaint was filed February 8, 1909), in which reply it pleaded the judgment and decree of the Nebraska court, and the conveyance by the commissioner thereunder. This reply was treated as a reply to the amended answer and cross-complaint filed March 25, 1909, which was substantially identical with that filed February 8, 1909, except that in the answer of March 25th George Miller, a minor, appeared by his guardian ad litem.

In a written decision filed on April 24th, the Court found that the sale of the West Brooklyn to the United Verde Copper Company by the defendants had not in fact been consummated on or before January 1st, 1908, but that the failure to consummate such sale was caused by the failure and refusal of the plaintiff to dismiss the action No. 4541 brought by the plaintiff against the defendants in December, 1906, which involved the title to the West Brooklyn claim, and the dismissal of which was made obligatory upon the plaintiff by the terms of the agreement. The court found from the record that this suit was not dismissed until February 15th, 1908, and that another similar suit was brought by the plaintiff before an opportunity was afforded the defendants to consummate said sale. That the defendants, prior to January 1st, 1908, endeavored to effect the sale to the United Verde, and that the pending litigation prevented such sale; that the United Verde had ever since

been willing to make the purchase at the price of ten thousand dollars if pending litigation was dismissed, and a clear title could thereby be given them. The court then held that the plaintiff was not then in a position to enforce specific performance on the part of the defendants for the reason that it was itself at fault in not dismissing the litigation, thus removing the obstacle to the negotiation and consummation of the sale. The court further held that as all the parties were before the court, and the agreement was regarded by the parties as still in force, that he would not dismiss the action, but would grant to the defendants reasonable time to consumate the sale under the terms of the agreement. The judgment of the court therefore was that an interlocutory order and decree be entered, giving the defendants ninety days from that date to make the sale and comply with the other terms of the agreement. Thereupon the court caused an interlocutory decree to be entered as follows:

"This cause came on regularly to be heard on the 25th day of March, 1909, plaintiff appearing by John J. Hawkins and T. C. Job, Esqs., its attorneys, and F. S. Howell of counsel, and defendants, Charles C. Miller, Ada M. Miller, Charles C. Miller No. 2 and George Miller, a minor, by Charles C. Miller No. 2, his guardian ad litem, appearing by Reese M. Ling, Esq., and Messrs. Norris & Ross, their attorneys.

A jury being expressly waived by both parties, the cause was tried to the court upon plaintiff's amended and supplemental complaint, the amended answer and cross-complaint of defendants Charles

C. Miller, Ada M. Miller, Charles C. Miller No. 2 and Charles C. Miller No. 2 as guardian ad litem of George Miller, a minor, and plaintiff's reply to said amended answer and cross-complaint, together with said defendants' motion to strike and replication addressed to said reply. Evidence both oral and documentary was introduced on behalf of the respective parties, and the parties rested, and the cause was submitted to the court for its decision and judgment. Thereafter it was argued to the court by counsel of the respective parties through written briefs.

The court having considered the evidence in said cause, the argument of counsel, and the principles of law and equity applicable thereto, and being fully advised in the premises, on the 24th day of April, 1909, made and filed its written decision herein, and orders that a judgment and decree be entered in accordance therewith.

Now therefore, for the purpose of giving defendants an opportunity to consummate the sale of the "West Brooklyn" mining claim to the United Verde Copper Company, or make a binding contract for such sale free and clear of all claims and litigations on the part of plaintiff touching or questioning said title, and in accordance with said written decision and for the purpose of fully determining the rights of the parties hereto under the contract sued upon an alternative decree is hereby made and entered herein as follows, to-wit:

(1) That within thirty (30) days from the date hereof plaintiff shall file herein its written consent that this decree conditional upon a sale of the

"West Brooklyn" mining claim to the United Verde Copper Company as hereinafter provided shall become final, irrevocable and non-appealable, and consenting that said defendants within the time hereinafter stated may make a sale or a binding contract therefor of the "West Brooklyn" mining claim to the United Verde Copper Company free and clear of all claims and litigations on the part of plaintiff questioning or effecting the title to said claim.

(2) That if plaintiff shall fail, or refuse to file herein within said period of thirty days from the date hereof its written consent and waiver as provided herein, then and in such event plaintiff's action herein shall stand dismissed as of this date and plaintiff shall take nothing thereby.

(3) Ordered, adjudged and decreed that if within ninety days from the date hereof said defendants shall consummate or make a binding contract for the sale of "West Brooklyn" mining claim to the United Verde Copper Company, and shall deliver and pay over or tender to plaintiff herein the money, stocks, deed and proof of assessment work which is provided by the contract of August 27th, 1907, shall be paid over and delivered by defendants to plaintiff, then and thereupon this decree shall forthwith become final, irrevocable and non-appealable as of this date, and plaintiff shall be forever barred and estopped from claiming any right, title or interest in or to said West Brooklyn mining claim.

(4) Ordered, adjudged and decreed that if plaintiff within the period aforesaid shall file its said written consent and waiver as above provided, and

defendants shall fail to make such sale or binding contract therefor to the United Verde Copper Company, and to pay over and deliver or tender the money, stocks, deed and proof of assessment work aforesaid within the said period of ninety days, then and thereupon defendants shall forthwith execute and deliver to plaintiff a valid and sufficient deed conveying to plaintiff all their right, title and interest in and to the "West Brooklyn" mining claim as mentioned and provided in said agreement of August 27th, 1907, and said agreement shall be fully carried out by all the parties hereto.

(5) Ordered, adjudged and decreed that plaintiff is not entitled to have or recover anything herein, by virtue or by reason of that certain decree described in plaintiff's reply to defendants' cross-complaint herein rendered by the District Court of Douglas County, State of Nebraska, that the commissioner's deed made under and pursuant to said decree is void and of no force or effect, and that said deed does not constitute a cloud upon the title of the "West Brooklyn" mining claim.

(6) Ordered, adjudged and decreed that plaintiff is not in any event entitled to an accounting herein, or to have or recover in this action on account of silica heretofore sold or shipped by defendants or any of them from the "West Brooklyn" mining claim, and defendants shall have and recover from plaintiff their costs herein taxed at $37.35.

Done in open court this 24th day of April, 1909.

Richard E. Sloan, Judge."

The appellant failed and refused to file within

thirty days after said decree its consent as provided in paragraphs 1, 3 and 4 of the same. Its failure and refusal to file its consent as provided in said decree, renders the decree as set forth in paragraphs 1, 3, 4, 5, and 6, inoperative, and leaves as a final and substantive decree only paragraph 2 dismissing the plaintiff's action.

The denial of an accounting as mentioned in paragraph 6 was inadvertently ordered, for the dismissal without prejudice of that part of the complaint which called for an accounting, on March 26, 1909, would prevent the court from adjudicating that question in this case.

It is conceded that the sale of that West Brooklyn to the United Verde Copper Company was not consummated prior to January 1, 1908, also that action No. 4541 entitled Brooklyn Mining & Milling Company vs. Charles C. Miller, Alonzo V. Miller, and George B. Lasbury, which related to the title of the West Brooklyn was not dismissed prior to January 1, 1908.

The trial Court found, and we think properly, that the failure by appellant to dismiss the action indicated in the contract, prevented appellees from consummating a sale to the United Verde Copper Company within the period allowed them by the contract. Therefore, upon the state of facts existing at the time of the trial, appellant was not entitled to specific performance. We further find that the failure of appellant to accept the terms offered by the court in its decree leaves it in the position where the record puts it, with the complaint dismissed for want of equity.

In the trial court below plaintiff plead by reply to the cross-complaint of appellees, the Nebraska judgment and decree. The effect of the Nebraska decree presents an interesting question. But this question was only raised in this case by the reply of the appellant to the cross-complaint of the appellees, and as the lower court gave no relief to appellees on such cross-complaint and dismissed the action for specific performance on other grounds, that feature of the case was never reached.

We find that the Nebraska decree herein referred to is set out as exhibit "D" to appellant's reply to appellees' amended answer and cross-complaint, and was offered in evidence with appellant's Exhibit "L," and that the decision of the Nebraska court is set out as Exhibit "A" to appellees' replication; these references being made at this point to avoid repetition.

The appellant claims that it only plead the Nebraska decree because after the stipulation above mentioned had been made, the appellees filed a cross-complaint claiming title to the property mentioned in the contract. We do not think that the contention attempted to be made will avail the appellant for the reason that the continuance of December, 1908, was granted appellant on the stipulation that if the case were continued, no judgment that might be secured in Douglas County, Nebraska, should be pleaded in the case. We find that this estops the appellant from pleading the Nebraska judgment, and sustains the lower court's ruling that it was "not entitled to recover anything herein under, by virtue of or by reason of" such decree.

The appellant does not contend that the commissioner's deed is valid or of any effect in this jurisdiction. The decree that the commissioner's deed is void and does not constitute a cloud upon the title to the West Brooklyn claim, while sound as a declaration of law, was not necessary to the determination of the question finally decided by the court, and for that reason has no place in the decree.

As conclusions of law from the foregoing facts we find that the judgment of the lower court should be affirmed, but for full protection of the appellant from any prejudicial effect of any portion of the decree other than that of dismissal, the judgment of this court is that the judgment and decree of the lower court be modified to read, "It is ordered, adjudged and decreed that plaintiff's action shall stand dismissed, and plaintiff shall take nothing thereby, and that defendants shall have and recover from the plaintiff their costs herein, taxed at $37.35," and that such modification of the judgment of the lower court is affirmed.

(All references herein to transcript are to the original or marginal pages.)

This appeal brings into review the decree of the Supreme Court of the Territory of Arizona affirming the judgment of the District Court.

PROPOSITION I.

The findings of the District Court adopted by the Supreme Court in its judgment of affirmance brought here as a statement of facts in the nature

of a special verdict, present the sole question for determination, apart from exceptions duly taken to rulings on the admission or rejection of evidence—do the findings of fact support the judgment?

This well recognized principle of practice is uniformly adhered to by this court, as will appear by reference to the following cases, which we are content to cite without further comment:

Samuel Stringfellow v. Jos. M. Cain et al., 99 U. S. 610.

Neslin v. Wells Fargo Co., 104 U. S. 428.

EILERS v. Boatman et al., 111 U. S. 356.

Idaho & Oregon Land Imp. Co., v. Bradbury, 132 U. S. 509.

Mammoth Mining Co., v. Salt Lake Machine Co., 151 U. S. 450.

Haws v. Victoria Copper Min. Co., 160 U. S. 303.

Gildersleeve v. New Mexico Min. Co., 161 U. S. 573.

Bear Lake & River Water Works & Irr. Co., v. Garland et al., 164 U. S. 18.

Harrison v. Perea, 168 U. S., at page 323.

We take it as conceded that the consideration for the contract of August 27, 1907, upon which this action is based was the dismissal and settlement of the then pending litigation.

Added to this, the controlling facts found are:

(1) That the contract made it obligatory upon appellant to dismiss action No. 4541, which involved

the title to the West Brooklyn claim, prior to January 1st, 1908.

(2) That appellant failed and refused to dismiss said action within the time.

(3) That the failure and refusal to so dismiss said action No. 4541 caused the failure of appellees to consummate the sale to the United Verde Copper Company within the period allowed by the contract, to-wit, January 1st, 1908.

The findings of the court show a deliberate, persistent and successful attempt to defeat the sale to the United Verde Copper Company.

Counsel for appellees requested dismissal of action No. 4541, Brooklyn Company v. Millers, in December, 1907, and directed the dismissal of action No. 4608, Miller v. the Company, but appellant declined to dismiss the action against Millers (Trans. 304).

Again, on January 2, 1908, appellees filed a motion in cause No. 4541 to require its dismissal under the agreement of August 27, 1907, and again dismissal was declined (Trans. 304-5).

On January 28, appellant brought suit in the District Court of Douglas County, Nebraska, against appellees for the specific performance of this agreement (Trans. 305).

On February 11 appellant, instead of dismissing action 4541, as provided by the contract of August 27, 1907, filed a supplemental complaint therein asking for specific performance of that identical contract, (Trans. 305).

On February 15th it dismissed action 4541 involving the title to the West Brooklyn claim, and immediately filed action 4923 for the specific performance of the same contract, wherein it claimed ownership of the West Brooklyn by virtue of the contract of August 27, 1907, and asked that a conveyance from appellant to it be required and that appellant's title be quieted therein (Trans. 305-6).

On February 18, 1908, at nine o'clock a. m., the Brooklyn Company dismissed action 4923, and at nine o'clock and ten minutes, same day filed the case at bar, No. 4927 (Trans. 306).

The actions numbered 4541, in which a lis pendens was filed, 4923 and 4927, and the suit brought in Nebraska on January 28, 1908, all involved the title to the West Brooklyn claim ,and in all of the actions the Brooklyn Mining Company sought specific performance of the contract of August 27, 1907. In action 4541 specific performance was asked by the supplemental petition (Trans. 306).

There could be no plainer or more conclusive proof of appellant's deliberate, persistent and successful attempt to circumvent the performance by appellees and bring about the default complained of.

The court's conclusion of law drawn from the foregoing facts, that appellant is not entitled to specific performance because of its own failure and refusal to perform, is unavoidable. Appellant's complaint was properly dismissed for want of equity. It had no right to require specific performance because it was itself at fault in enforcing the condition it urges as the reason for its action.

The findings are so plain and simple and the conclusions of law so unavoidable and direct in support of the judgment that we do not feel called upon to tax the court's attention with further argument on this phase of the case.

There is no question here for the court's consideration upon exceptions taken to rulings on the admission or rejection of testimony and we do not hesitate to urge with confidence that the decision of the Supreme Court of the Territory of Arizona be affirmed.

We do not find that appellant has properly brought here any question for consideration beyond the foregoing. But it has extensively argued questions which we do not believe can properly be considered; however, if they are examined, it must necessarily confirm our position that the findings not only support the judgment, but are in all respects proper findings.

PROPOSITION II.

The contract of August 27, 1907, was in the alternative. Appellant had no right to a choice of its alternatives unless appellees should fail without any fault of appellant. When by its own wrong appellant brought about the condition complained of, it was properly denied specific performance.

Under Point I, (p. 21 of Appellant's Brief,) it is urged that appellant was entitled to specific performance of the contract in suit without regard to whether it prevented the consummation of the sale

to the United Verde or not. Under this head there is considerable juggling of the words "sale," "confirmation," "transfer," "delivery," and "receipt of all the money." It is contended that appellees did not charge appellant with causing their failure to make the sale, but only their failure to have fully and completely transferred and delivered the title and to have received all the money in payment therefor.

The contract itself recites a conditional sale in existence at the time it was made, of the West Brooklyn to the United Verde for $10,000.00 (Trans. 3) and provided that the litigation then pending should be dismissed and gave appellees thereafter to January 1, 1908, to consummate that sale. So there was nothing left to be done but a transfer of title completing a full conveyance and receipt of the purchase price. What more under this state of facts could appellant have prevented?

The argument of appellant would indicate that the contract wherein it recited "if for any reason the sale * * * * shall not be consummated, the defendants are to deed to the plaintiff the West Brooklyn," authorized it to defeat the consummation of the sale by any means possible, equitable or inequitable, and yet enforce this conveyance (p. 29 Appellant's Brief).

The academic discussion following this proposition in appellant's brief and the citation of authorities as to what constitutes a sale or binding contract of sale in given cases, is quite apart from the question at issue.

PROPOSITION III.

Appellant's default in failing and refusing to dismiss action 4541 before January 1, 1908, and its tenacious maintenance of the suit as a pending action with its consequences, was ample and sufficient reason for the court's refusing a decree of specific performance.

Under Point II, p. 32 of Appellant's Brief, the argument is found that it was guilty of no default which would warrant the court in denying the decree of specific performance. In the same breath that it admits default in refusing to dismiss its action against appellant prior to January 1, 1908, it is contended (under sub-division A, same page), that if the contract itself did not operate to dismiss the action, appellant had the right to formally dismiss at any time prior to the decree for specific performance. How can this position be reconciled with the effort to compel specific performance of the contract in action 4541, the very suit which the contract provided, as a consideration for its own existence, should be dismissed (Trans. 305)? Again, if appellant did not have to dismiss action 4541, what did it give for its change of position from plaintiff in a lawsuit seeking to establish ownership of the West Brooklyn, to one of contract fixing its relations toward the property, to save expense and dispose of the controversy?

On p. 35, Appellant's Brief, it is confessed that the suit should be dismissed, viz: "That the agreement was a complete settlement between the parties of all antecedent disputes and the pending suits

were to be dismissed without any further consideration, can not be questioned for the agreement is absolute that they should be dismissed."

In September 1906 the option or conditional contract of sale of the West Brooklyn to the United Verde Copper Company mentioned in the contract of August 27, 1907, was entered into. This was extended from time to time in force to January 1, 1908 (Trans. 301). Pearsall said, "The conversation which I particularly recall with Mr. R. C. Miller was during the last part of the holiday week of 1906, at or near Dewey, Arizona. Mr. Miller said to me that they had given an option to the United Verde on the claim." (Trans. 117). On the 31st day of December, 1906, action 4541 was commenced. Every reason exists for the conclusion that this suit was commenced to stop or prevent the consummation of the sale of the West Brooklyn to the United Verde. The same reason exists for the conclusion that the consideration forcing appellees to make the contract of August 27, 1907, wherein they conceded definite contractual rights to appellant in substitution for the indeterminate rights set out in its original cause of action, was the urgency of the situation necessitating, as between the parties to the sale, that appellees secure the dismissal of the suit affecting the title prior to the actual payment of the purchase price. The contract as it had been extended would expire January 1, 1908. Manifestly, this contract between appellant and appellees was made to free the record for the remainder of the life of the conditional sale contract to the United Verde (Tr. 189). This being so, is not the time of the dismissal of that suit of the very essence of the contract; otherwise its

purpose is lost and the intention of the parties destroyed.

It is pertinent to adopt the quotation found on p. 33 of Appellant's Brief from Pom. Con. p. 462, sec. 390, Whiteman vs. Perkins, 56 Neb. 181, 185:

> "It is now thoroughly established that the intention of the parties must govern; and if the intention clearly and unequivocally appears from the contract, by means of some express stipulation, that time shall be essential, the time of completion or performance or of complying with the terms, will be regarded as essential in equity as much as at law."

It is admitted on p. 36 of Appellant's Brief that,

> "The contract created a vested right for the dismissal of all the lawsuits referred to."

This is true, but appellees were denied the benefit of this right by the persistent refusal of appellant to dismiss during the life of appellees' conditional sale contract with the United Verde. It would be hard to imagine a case where the time for performing a given duty could be more of the essence of a contract than the duty of appellant to have dismissed its suit, if not immediately then surely during the unexpired term of appellees' contract with the United Verde.

In the face of the above admission, appellant makes the startling proposition (p. 37 Appellant's Brief) that,

> "Appellees made no proper tender of performance following which appellant would be

obliged to dismiss its suit against Miller et al. according to the terms of the contract."

Thus assuming and asserting the contradictory and false premise that its duty to dismiss depended upon the character of tender of performance by appellees. The truth is made plain when (p. 40 Appellant's Brief) we read:

> "Whether the tender was, or not, a full compliance with all that defendants were to do under the contract, depends upon whether they were to do any of the things offered to be done by them unless the sale was in fact consummated before January 1, 1908. We think it is clear that unless the sale of the West Brooklyn was consummated defendants would not owe the shares of stock nor the $3,150.00, etc., to plaintiff, and for that reason no tender, without the sale, could be operative."

The closing words of this quotation disclose appellant's real position. However wide its circle of reasoning and however oft repeated, it always comes back to this point, which is, in effect, that in spite of its having itself prevented appellees' consummation of the sale to the United Verde, the failure existed, and it could take advantage of it regardless of equities.

Considering alone the language of the contract, it is nothing short of marvelous that appellant ever should have contended that it did not require the dismissal of its action concerning the West Brooklyn or should have imagined it possible for the Millers to sell the West Brooklyn with that lawsuit hanging over it.

Both the trial court and the Supreme Court of the Territory of Arizona held that this agreement required appellant to dismiss its suit against the Millers on or before January 2, 1908.

If in addition to this, the court should care to examine the record to find whether the purpose of the agreement was to get rid of this litigation, we refer to marginal pages 129 and 134 Transcript, where Pearsall, a truly remarkable witness, says he did not know the United Verde would not buy the claim with the lawsuit pending, yet he felt that the lis pendens of the action would protect the company against anybody, even the United Verde Copper Company. Six months before the contract of August 27th was written, Pearsall had carefully copied appellant's exhibit "N," being a letter written by C. C. and A. V. Miller, in which it was stated that the United Verde will buy if the lawsuit is eliminated (Tr. 241), and Pearsall was urged to dismiss the lawsuit at once or the West Brooklyn would become worthless (Tr. 242). C. C. Miller said, "The only reason that ever induced me to sign this contract was to get Pearsall's case dismissed" (Tr. 189). In October, 1907, Miller asked Pearsall to dismiss the suit, saying that on January 1st the West Brooklyn must go either to the appellant or the United Verde (Tr. 120). Miller wanted the suit dismissed in order to make a sale to the United Verde (Tr. 225). Pearsall would not dismiss until the sale was made (Tr. 126). In December, 1907, appellees' counsel demanded, in open court, that the action be dismissed, which was refused by appellant's counsel (Tr. 117). On January 2, 1908, appellees tendered to appellant, in open court, the

money, etc., required to be turned over if sale were made to the United Verde, and asked that the suit be dismissed (Tr. 169, 20 et seq.). The United Verde had gone so far as to advance part of the purchase price to the Millers, hoping thereby to get the title cleared of the litigation in order to complete the purchase (Tr. 236); if the litigation had been dismissed the purchase would have been made (Tr. 227).

This conduct on the part of appellant might appear inexplicable in view of its verified allegation that it entered into the contract of August 27, 1907, because of the great desirability of a sale to the United Verde (Tr. 8); yet Pearsall, who verified this allegation, testified (Tr. 124):

> "I always had the idea that if possible I would like to have that property go to the Brooklyn Mining & Milling Company instead of the United Verde Copper Company."

It was his hope and desire in December, 1907, that the United Verde should not purchase the property (Tr. 124 et seq.). His conduct was framed to realize this hope.

In view of these facts, if they could properly be considered, how it can be claimed, as asserted by appellant in Assignment of Error III (Tr. 291) and in its Brief (p. 13) that,

> "This contract was a reciprocal contract, binding on both parties, and from the date of its execution, August 27, 1907, both of said causes of action were extinguished and dis-

missed, and it was error in the court not to so hold,"

is beyond our comprehension.

Again, in Assignment of Error No. 11, "The judgment of affirmance dismissing appellant's complaint is contrary to equity in this—that appellant from the time of making the contract abandoned its cause of action against appellees and has dismissed the same."

We can not aid this court by pointing out the numerous contradictions appearing from page to page in counsel's brief. The plain truth is that appellant while deceitfully pretending performance, pursued this litigation against appellees in the same manner after the contract of August 27, 1907, that it had before, and with the purpose of defeating the consummation of the sale to the United Verde Copper Company.

This was finally demonstrated beyond all doubt when appellant failed and refused to file its written consent and waiver within thirty days after the date of the decree allowing appellees sixty days within which to consummate a sale or binding contract of sale to the United Verde of the West Brooklyn mining claim, free and clear of all claims and litigation on the part of appellant questioning the title. If it had filed this waiver and appellees had failed to make the sale within ninety days from the date of the decree, it bound appellees to deed the West Brooklyn to appellant. The order of dismissal was only

"That if plaintiff (appellant) shall fail, or refuse, to file herein within said period of thirty days from the date hereof its written consent and waiver as provided herein, then and in such event plaintiff's action herein shall stand dismissed as of this date, and plaintiff shall take nothing thereby."

Thus appellant was given an opportunity to require appellees to consummate a sale to the United Verde, although nearly two years after their conditional contract had expired; but rather than offer a pretense of justice so long delayed, it chose the alternative of having its action dismissed.

PROPOSITION IV.

NEBRASKA DECREE AND DEED.

The Nebraska decree could not control the court in Arizona:

1. Because the suit in Nebraska affected the title of real estate in Arizona, the same title being in question in the court of Arizona at the time the Nebraska action was commenced.

The record shows that the Nebraska action was commenced after the title of the West Brooklyn had been put in issue in Arizona, the Arizona court having jurisdiction over all the parties and the subject matter.

A court before whom an action is pending affecting the title of real property within its jurisdiction, having also jurisdiction of all the parties, should

not be compelled to race, in order to determine the title, with a court of another State before whom the same title is involved by an action later commenced. At the time the suit was commenced in Nebraska, lis pendens had been filed under the action in Arizona, which was notice to all the world.

2. Because the Nebraska court did not have jurisdiction of all the parties and could not settle the whole title.

As the real estate, "the subject matter of the controversy," was situated in Arizona, litigation in respect to its title belonged properly to the courts within Arizona.

Ellinwood v. Marietta Chair Co., 158 U. S. 105, 107.

"Although if all the parties interested in the land were brought personally before a court of another State, its decree would be conclusive upon them and thus in effect determine the title."

Fall v. Eastin, 215 U. S. at page 11.

We fail to find any authority upholding the judgment of a foreign court affecting the title to lands in another State where only a portion of the parties interested in the title are before it. This could but lead to the utmost confusion: as in the present case, if the Nebraska decree should be held to settle the question as against Lasbury and Ada M. Miller, while the courts of Arizona should settle the question as to the title in favor of the other defendants, these conflicting decisions of the courts would but confuse the title.

3. It was sought to have the court in Arizona enforce the Nebraska decree, whereas in order to make it effective, it must be enforced through the instrumentality of the person of the defendants acting under the process of the court rendering the judgment.

It is not claimed that the Nebraska decree or deed could affect the interest of C. C. Miller in the West Brooklyn.

As to the commissioner's deed, it is only necessary to observe that it could have no possible effect as a conveyance, and may be entirely disregarded as an element in this case.

Watts v. Waddle, 6 Pet. 389.

Watkins v. Holman, 16 Pet. 25.

Fall v. Eastin, supra.

There are many other authorities to the same effect. As to the decree itself, the cases are equally conclusive in support of the decisions of the Arizona courts.

The decision of this court in the case of Fall v. Eastin, cited above, affirms the decision of the Supreme Court of Nebraska in the case of Fall v. Fall, 113 N. W. 175. This latter decision is noticeable because rendered by the Supreme Court of the State in which the judgment relied on was rendered. That judgment was rendered by a court of the State of Washington, having full jurisdiction of the parties. It required the defendants to convey land sit-

uated in Nebraska. Upon failure of the defendant to make the required conveyance, a commissioner acting under authority of the decree made the conveyance.

The Supreme Court of Nebraska said:

> "The decree and order acts only upon the person, and if obedience to its mandate be refused, it can only be enforced by the means which have from time immemorial been the weapon of the Court of Chancery * * * *. In order to vest Mrs. Fall with any right, title or interest in and to her husband's lands in Nebraska by virtue of the Washington decree, it was absolutely necessary that the decree be carried into effect by that court by compelling a conveyance from her husband. Neither the decree nor the commissioner's deed conferred any right or title upon her. The decree is inoperative to affect the title to the Nebraska land and is given no binding force or effect so far as the courts of this State are concerned by the provision of the constitution of the United States, with reference to full faith and credit."

Upon appeal to this court the Nebraska decision was confirmed. The contention of the appellant in that case was:

> "That the decree of divorce in the State of Washington which was made in consummation of the equities which arose between the parties under the law of Washington was evidence of her right to the legal title of at least as much weight and value as a contract in writing, reciting the payments of the consideration for the land, would be."

The defendant contended, "That the Washington court had neither power nor jurisdiction to affect in the least, either legally or equitably, lands situated in Nebraska."

It was further claimed by the appellant that the Washington judgment or decree would be conclusive upon the parties in any subsequent proceeding in a court having jurisdiction of the lands for the purpose of quieting the title in the equitable owner. The issue thus raised was as to the extra territorial operation of the decree. The court reviews its earlier decisions and re-affirms the established rule:

> "That when the subject matter of a suit in a court of equity is within another State or country, but the party is in the jurisdiction of the court, the suit may be maintained and remedies granted which may directly affect and operate upon the person of the defendant and not upon the subject matter, although the subject matter is referred to in the decree and the defendant is ordered to do or refrain from certain acts toward it; and it is thus ultimately but indirectly affected by the relief granted. In such case the decree is not of itself legal title nor does it transfer the legal title. **It must be executed by the party and obedience is compelled by proceedings in the nature of contempt attachment or sequestration.**"

This decision and the one which it affirms, when carefully considered, are entirely conclusive against appellant herein. No material distinction can be drawn between them and the case at bar. As stated by this court,

"The territorial limitations of the jurisdiction of the courts of a state over property in another state has a limited exception in the jurisdiction of a court of equity, but it is an exception well defined.

The fundamental error of appellant is that it seeks to extend the limits of this exception and to have the Arizona courts enforce the Nebraska decree; that is to say, seeks to use the Arizona courts as an instrumentality with which to enforce that decree, whereas, such a decree is necessarily ineffective where real estate in a foreign jurisdiction is involved, unless it is enforced through the instrumentality of the person of the defendant acting under the process of the court which rendered the judgment.

Other cases sustaining the views just stated are:

Enos v. Hunter, 9 Ill., 214.
Wilson v. Braden (W. Va.), 36 S. E., 367.
Wimer v. Wimer, 82 Va., 890.
Lindley v. O'Reilly, 50 N. J. L., 636.

For the purpose of rendering its decree effective, the court of Nebraska might have prevented the defendants from leaving the jurisdiction of the court pendente lite by a writ of ne exeat.

Enos v. Hunter, 9 Ill., 214.

As far as the decree itself is concerned it may be disregarded by the courts of this territory, since no conveyance was made by Mrs. Miller.

Wilson v. Braden (Supra).

As stated by the New Jersey Court of Appeals in Bullock vs. Bullock, 52 N. J. Eq., page 561; 27 L. R. A., 213, referring to a decree of a New York court in reference to lands in New Jersey,

> "It is a mis-use of terms to call the burden thereby imposed on respondent a personal obligation. At the most the decree and order imposed a duty on him, which duty he owed to the court making them. That court can enforce the duty by its process, but our courts cannot be required to issue such process or make our decrees operate as process. * * * The establishment of the contrary doctrine would result in practically depriving a state of that exclusive control over immovable property therein which has always been accorded."

The iniquity of the doctrine urged by appellant is particularly illustrated in the case at bar. It appears from the record as before stated that long before the Nebraska suit was instituted, all of the owners of the West Brooklyn were before the Arizona court in a suit brought by appellant concerning the title of the West Brooklyn. The Nebraska judgment is clearly unsupported by the decision of the court for the particular reason that the court found that the United Verde would have bought the West Brooklyn if the appellant had complied with its contract. (Trans. 75).

It would be a remarkable thing if one of our courts having a controversy pending before it concerning the title to real estate situate within its jurisdiction should be required to determine that controversy in accordance with an obviously erroneous judgment of a court of the State of Nebraska

rendered in a proceeding instituted after the proceedings in Arizona, and which the Nebraska court never took the pains to carry into effect according to its terms.

The decision of the Nebraska court stands here fully satisfied and discharged. The penalty imposed by it for a failure on the part of the defendants to make the required conveyance has been satisfied and the ineffective commissioner's deed accepted by appellant in satisfaction of the judgment. Having now found that this deed is worthless, appellant seeks to have the Arizona court do what it failed to have done by the proper court and asks this court to use its decree as process in aid of the Nebraska court.

4. The stipulation of December 22nd, 1908, estopped appellant from pleading the Nebraska Decree, or offering either it or the Commissioner's Deed thereunder in evidence.

When this stipulation was made appellant was facing a trial the next day in the Arizona Court. By the stipulation that any judgment which might be rendered in the Nebraska Court should not be pleaded it obtained the continuance whereby it was enabled to force the case to trial in Nebraska before the trial in Arizona. At this point a natural mental query arises as to why appellant sought to run away from a trial in the Arizona Court having jurisdiction of the subject matter and of all of the parties necessary to a complete determination of all the issues to appear before the Nebraska Court and prosecute the same action wherein no jurisdic-

tion could be obtained over the subject matter and at best personal jurisdiction of only a part of the defendants.

Appellant seeks to justify its pleading of this Decree by the claim that when the stipulation was made the title to the West Brooklyn was not involved in the action. This assertion is absurd. The very purpose of the action was to compel appellees to convey the title over to appellant, which was recognized by the Contract of August 27th, 1907, to be in appellees.

No question of law or fact is raised in this case of sufficient dignity to warrant the voluminous record presented. We feel that we have noticed unnecessarily many matters, but we readily submit the case, confident that upon examination of it, the judgment of Supreme Court of Arizona will be affirmed.

Respectfully submitted,

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